CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 268.

AYER & LORD TIE COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY, BY FRANK A. LUCAS, REVENUE AGENT OF SAID COMMONWEALTH.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED MAY 22, 1905.

(19,769.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 31, 1905.

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Please Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, on the 17th day of December, 1903.

COMMONWEALTH OF KENTUCKY, by FRANK A. Lucas, Revenue Agent for the State at Large, Appellant,
vs.
THE AYER & LORD TIE COMPANY, Appellee.
} Appeal *for* the McCracken Circuit Court.

Be it remembered that heretofore to-wit, on the 23rd day of March A. D. 1903 the appellant by his attorney filed in the office of the clerk of the court of appeals, a transcript of the record, in words and figures as follows, to wit—

1.

Please Before the Hon. L. D. Husbands, Judge of the McCracken Circuit Court, at the Court House, in the City of Paducah, Ky., on the 5th day of February, 1903.

COMMONWEALTH OF KENTUCKY, by FRANK A. LUCAS, Revenue Agent, Pl'ff,
vs.
AYER & LORD TIE COMPANY, Def't.

Be it remembered that heretofore to-wit, on the 21st day of October, 1902, the pl'ff, by attorney, filed in the clerk's office of the McCracken circuit court the following transcript from the McCracken county court, viz:—

Transcript from McCracken County Court.

STATE OF KENTUCKY:

McCracken County Court, Regular Term, 1st Day, September 8th, 1902.

Hon. R. T. Lightfoot, Judge, Presiding.

COMMONWEALTH OF KENTUCKY, by FRANK A. LUCAS, Revenue Agent, Pl'ff,
vs.
THE AYER & LORD TIE COMPANY, Def't.

This day came defendant and offered to file petition for removal of this action to the U. S. court and also offered to file bond under act of Congress with H. Baker & James Campbell sureties thereon, to all of which the plaintiff objects and this case is continued.

Afterwards to-wit: on the 17th day of October, 1902 the following order was made herein, viz:

The following order was entered of record herein *nunc pro tunc* as of the 27th day of September, 1902.

This day the following judgement was filed herein, and ordered recorded viz:—

This day the question coming on to be heard by the court on the demurrer entered to the defendant's answer, the court being sufficiently advised adjudges that said demurrer be overruled, to which pl'ff, excepts, and the plaintiff declining to further plead, elects to abide the demurrer, and thereupon the court dismissed the plaintiff's statement and action, to all of which the plaintiff accepts and prays an appeal to the circuit court of McCracken county, which is granted.

Afterwards to-wit, on the 20th day of October, 1902, the following order was made herein, viz:—

The following order is entered of record *nunc pro tunc* as of the 26th day of September, 1902

This day came plaintiff and filed answer herein, and this matter is continued.

4 STATE OF KENTUCKY, }
County of McCracken, } *sct:*

I, Chas. E. Graham, clerk of the McCracken county court, certify that the foregoing pages contain a full, true and complete copy of all the orders made in the foregoing styled action and that there appears attached thereto, all the original papers filed in said action, also a taxation cost therein.

Given under my hand, this 20th day of Oct., 1902.

CHAS. E. GRAHAM, Clerk.
By H. SNEDLEY, D. C.

COMMONWEALTH OF KENTUCKY, by, &c., Pl'ff, }
vs. } Taxation Cost.
AYER & LORD TILE COMPANY, Def't. }

Order def't offer file petition &c. 30	30
" " " " bond 30	30
Order pl'ff obj. 30 order continue 30	60
File judgement 15 order 30 order record 30	75
Record judgement, 50 order grant appeal, 30	80
Order file pl'ff answer, 30 file same, 15	45
5 Continue .30	30
Brief .10 papers .30 tax cost and copy .50	90
Summons 1 copy	50
Copies of 3 orders, judgement &c.	1.00
	5.90
	.60
	$6.50

The following is the summons which is issued on the foregoing appeal, viz:—

Summons.

STATE OF KENTUCKY:

McCracken Circuit Court.

COM'TH OF KENTUCKY, &C., Appellant,
vs.
THE AYER & LORD TIE COMPANY, Appellee. } Summons of Appeal.

To the sheriff of McCracken county:

You are hereby commanded to summon the Ayer & Lord Tie Company to appear in the McCracken circuit court on the 1st day of its next December term, and answer the appeal taken by the Commonwealth of Kentucky by Frank A. Lucas, revenue agent, from a judgement rendered by McCracken count- court in the action wherein the said Com'th of Ky &c. was the pl'ff, and said Ayer & Lord Tie Company was def't.

6 Witness my hand, as clerk of said court, this 21st day of October, 1902.

H. H. HOBSON, Clerk.
By W. C. KIDD, D. C.

Endorsed on back as follows, viz:

Sheriff Return on Summons.

Executed on the Ayer & Lord Tie Company by delivering to H. Baker, resident agent for said company in McCracken county Nov. 25, 1902.

L. D. POTTER, S. McC. C.
By WM. LYDON, D. S.

The following are the original papers from the McCracken county court, filed in the clerk's office of the McCracken circuit court, on the 21st day of Oct., 1902, in this action, referred to in the foregoing transcript, from said county court, viz:—

Statement.

Plaintiff states that Frank A. Lucas was, on the 28th day of June, 1902, duly appointed revenue agent for the Commonwealth of Ky., State at large, by the auditor of public accounts for the Commonwealth of Kentucky, and executed bond and duly qualified, and is now action as such revenue agent and by reason of his office, now prosecutes this action in the name of the Commonwealth of

7 Ky. Plaintiff further says that the defendant, the Ayer — Lord Tie Company, is a corporation, duly organized, and en-

gaged in the business of buying, transporting, and dealing in railroad ties, and has been so incorporated and so engaged continuously from the 16th day of November, 1898, to the date of the filing of this statement, and that it has an office in the city of Paducah, in the county of McCracken and State of Kentucky.

Plaintiff states that the defendant was, on the 15th day of September, in the years 1899, 1900 and 1901, the owner, seized of, and in possession of two certain steamboats known as the Russel Lord, and the Pavonia; that the value of said steamboats, the "Russel Lord," on each of said days, was $3,000.00 and of the said steamboat, "Pavonia," $3000.00, that said steamboats were, on each of said days, enrolled, in accordance with the laws of the United States governing navigation, at the port of Paducah, in the county of McCracken and State of Kentucky; that, as required by the said laws of the United States governing navigation, the words, of "Paducah, Kentucky," were painted on the stern of said steamboats; that said boats when not in use, are kept at Paducah, Ky., and that the said port of Paducah is, and was on each of said days, the home
8 port of said steamboats.

Plaintiff further says that the defendant was, on the 15th day of September, in the year 1901, the owner, seized of, and in possession of the steamboat "Iverness," and that the value of the said steamboat on said day was $10,000.00; that said boat was, on said day, enrolled, in accordance with the laws of the United States governing navigation, at the port of Paducah, in the county of McCracken and State of Kentucky; that, in accordance with said laws of the United States governing navigation, it had the words, "of Paducah, Kentucky," painted on its stern, that said boat when not in use is kept at Paducah, Kentucky., and that said port of Paducah was, on said day, the home port of said steamboat.

Plaintiff further states that each and all of said boats are now and were on each of the above days mentioned, used by the defendant for the purpose of towing ties, loaded on barges; that the defendant was, on each of the days aforesaid, the owner, seized of, and in possession of certain barges; used in connection with said steamboats, for the purpose of transporting railroad ties, and that said barges were, on the 15th day of September in each of the years 1899, 1900, and 1901, of the value of $10,000.
9 Plaintiff further says that the defendant failed and refused, and still fails and refuses, to assess any of said steamboats or barges for *at*xation for any of said years; and that the same are omitted and have never been assessed for either of said years; and it further states that no taxes for the Commonwealth of Kentucky, or the county of McCracken, or the city of Paducah, have been paid on any of said steamboats for any of said years.

Wherefore, plaintiff prays that said steamboat, the "Russell Lord," be assessed to the defendant, The Ayer — Lord Tie Company, for the purpose of State, county, and municipal taxation, due in and for the years 1900, 1901, and 1902, at $13,000; that the steamboat

"Pavonia" be assessed to the defendant, for taxes due in and for each of said years, at $3000.00; that the steamboat "Iverness" be assessed to the defendant, for taxes due in and for the year 1902, at $10,000 and that the barges above described be assessed to the defendant, for taxes due in and for each of the years 1900, 1901, and 1902, at $10,000; and that the defendant be adjudged to pay a penalty of 20 %, on the aggregate amount of taxes due and interest, and to pay the cost of this proceeding, and plaintiff prays
10 for all proper and general relief.

COMMONWEALTH OF KENTUCKY,
By FRANK A. LUCAS,
Revenue Agent, State at Large.

The foregoing statements are true, to the best of my knowledge and belief.

FRANK A. LUCAS.

Subscribed and sworn to before me, by Frank A. Lucas, this 22nd day of August, 1902.

L. K. TAYLOR,
Examiner, McCracken Co., Ky.

Petition for Removal to U. S. Court.

Now comes your petitioner Ayer & Lord Tie Company, and states that said Frank A. Lucas, the plaintiff in the aforesaid action who brings this suit for the Commonwealth of Kentucky, is a citizen of the State of Kentucky, that said cause can be fully and finally determined in the United States circuit court for the sixth circuit and the western district of Kentucky, that your petitioner, Ayer & Lord Tie Company, is a citizen from the State of Illinois, is a corporation created by and under the laws of the State of Illinois, a certified copy of the certificate or charter is herewith filed as part
11 hereof marked "A," engaged in business under its charter in the State of Illinois, that the Commonwealth of Kentucky is one of the States in the United States and is a State foreign to the State of Illinois, that the amount in controversy in the aforesaid cause amounts to more in value than the sum of two thousand dollars, exclusive of interest and cost.

And petitioner makes and files in this court a bond, with good and sufficient security, for its entering in such circuit court on the 1st day of its next session, a copy of the records in said suit, and for paying all costs that may be awarded for said circuit court, if said court shall hold that said suit shall be wrongfully or improperly transferred thereto, and also for the appearing and entering of special bail in such suit if special bail was originally requisite therein, and they pray of said court to accept said petition and bond and order the transfer of said cause to the said circuit court of the United States.

H. Baker says that he is the managing agent for the Ayer & Lord Tie Company, that the president and other officers of said company are beyond the county of McCracken, and that he believes
12 the statements in the foregoing petition are true.

H. BAKER.

Subscribed and sworn to before me by H. Baker, this 8th day of September, 1902.

— —.

The following is Exhibit "A" referred to in the foregoing petition to remove the U. S. court, viz:

EXHIBIT "A."

STATE OF ILLINOIS,
DEPARTMENT OF STATE.

William H. Hinrichen, secretary of state, to all to whom these presents shall come, Greeting.

Whereas, a statement duly signed and acknowledged has been filed in the office of the secretary of state on the 1st day of August, A. D. 1893 for the organization of the Ayer & Lord Tie Company, under and in accordance with the provisions of "An act concerning corporations," approved April 18th, 1872 and in force July 1st, 1872, and all acts amendatory thereof, a copy of which statement
13 is hereto attached.

And whereas, a license has been issued to Ed. E. Ayer, Jonn B. Lord and Phillip R. Smith as commissioners to open books for subscription to the capital stock of the said company,

And whereas, the said commissioners have on the 15th of August, A. D. 1903, filed in the office of the secretary of state a report of their proceedings under said license, a copy of which report is hereto attached.

Now, therefore, I William H. Hinrichen, secretary of the State of Illinois, by virtue of the powers vested in me by law do hereby certify that the said, Ayer & Lord Tie Company is a legally organized corporation under the laws of this State.

In testimony whereof, — hereto set my hand and cause to be affixed the great seal of State.

Done at the city of Springfield this 15th day of August
[SEAL.] in the year of our Lord one thousand eight hundred and 93, and of the Independance of the United States the one hundred and 18.

(Signed) W. H. HINRICHEN,
Secretary of State.

STATE OF ILLINOIS, } ss :
County of Cook. }

, Wm. S. Patch, a notary public, in and for the county of Du ge, State of Illinois do hereby certify that the above is a true and rect copy of charter granted the Ayer & Lord Tie Company, ler the laws of the State of Illinois.

[SEAL.] WM. S. PATCH,
Notary Public.

Know all men by these presents, that we, Ayer & Lord Tie Com- ny principal and H. Baker and James Campbell as sureties are d and firmly bound unto the Commonwealth of Kentucky, nk A. Lucas revenue agent for the Commonwealth of Kentucky, l to all others whom it may concern in the sum of three hundred lars, to which payment we bind ourselves and each of us by these sents. Given under our hand this 8th day of September, 1902. The conditions of this obligations are these: The said Ayer & Lord Tie Company, has applied to the county court in said count-, to remove a certain cause pending in said court, wherein the Commonwealth of Kentucky Frank A. Lucas enue agent for the Commonwealth of Kentucky is plaintiff, and Ayer & Lord Tie Company is the defendant, from said county rt to the circuit court of the United States for the sixth circuit l western district of Kentucky.

Now if said Ayer & Lord Tie Company shall enter in the said cuit court of the United States in the western district of Ken- ky, on the 1st day of the next term thereof, a copy of the record said suit and shall pay all the costs that may accrue or be awarded said circuit court, if it shall hold that the said suit was wrongfully improperly removed thereto, and shall also appear and enter special l in said circuit court in said suit, if special bail was originally uired therein, then this obligation shall be void; otherwise in l force.

AYER & LORD TIE COMPANY,
By H. BAKER, Agent.

H. BAKER,
JAMES CAMPBELL, Sureties.

Answer.

The Ayer & Lord Tie Company, that has been summoned in this case, in answer to the statement filed by the plaintiff in this case, comes and says; that it is a corporation duly and legally orporated under and by laws of the State of Illinois, on the 15th of August, 1893, and as such it has been empowered to transact siness with steamboats, engaged in interstate commerce, that a rter was granted to it under the seal and signature of W. H.

Hinrichsen, secretary of state, which certificate, is herewith filed as part hereof, marked "A;" it says that ever since its incorporation it has been engaged in business as owner of tow-boats, plying on the Miss., Ohio, Tenn., and Cumberland rivers and their tributaries, that the business in which tow-boats had been engaged is that of interstate commerce and of transporting railroad ties in its own barges from different points of said rivers to the port of Brookport, in the State of Ill., that their said tow-boats in pursuit of their business, occasionally touch at the point of Paducah, Ky., but never to discharge their cargo, but simply for the purpose of buying stores, employing seamen, and for other like purposes, that they and said barges are in the State of Kentucky but tempora-/ly, and most of their business is transportations
17 from ports and places in Alabama, Miss., Ky., Mo., Ark., Ill., and Tenn., to said port of Brookport, in the State of Ill., St. Louis, in the State of Mo., Duvals Bluff in the State of Ark., at which ports, said tow-boats discharge and deliver their respective cargo of ties, and said boats and barges owned and controlled by Ayer & Lord Tie Company, was engaged in the business aforesaid during and prior to years 1899, 1900 and 1901, and since owned by the said defendant company, have never been engaged in any other business but as aforesaid, nor has said company, since its incorporation, been engaged in any other business, than as aforesaid; that their said vessels were and are regularly licensed and enrolled by the United States under and in pursuance to the acts of Congress.

It says it has its main office in the city of Chicago, in the State of Illinois, and also has offices in the city of Mound City, in the State of Illinois, on the Ohio river, also in the port of Brookport, in the State of Illinois on the Ohio river and has an office in the State of Kentucky at Paducah, and Fulton, and also at Duvals Bluff, in the State of Arkansas, and these offices are in the State of Kentucky for convenience, but the principal office in the defendant corporation was, and is in the State of Illinois, of which State it
18 is a citizen, but denies the right of the State of Kentucky to cause to be assessed for taxation, for State, county or municipal purposes, the steamboats, Russell Lord, Pavonia, and Iverness, and its said barges or any of said property.

It says that it has the right under the acts of Congress of the United States, and the Constitution of the United States, to trade at the port of Paducah, Ky., Brookport, Ill., Mound City, Ill., and at ports on the Tenn., Miss., Cumberland and Ohio rivers, and their tributaries, free from molestation or interference on the part of the State of Kentucky, and says that the proceeding on the part of the State of Kentucky, by its agent Frank A. Lucas, to have its said property assessed for taxation, is an infringement of the rights of the defendant corporation, under the interstate commerce act, of the United States, and under the Constitution of the United States. Defendant denies that the State of Kentucky has any jurisdiction whatever, over the defendants steamboats, on said barges, for the

purpose of taxation, and says that this court has no jurisdic-
19 tion to try or determine this case, and it pleads to the juris-
diction of this court, and denies that this court has jurisdiction to cause defendants property or any of it mentioned in the statement, to be assessed for taxation for said municipal, county or State purposes.

Defendant says that its right to trade at the ports of the different States without molestation, by the State of Kentucky, or any of the other States, are secured to it by the Constitution of the United States; it denies the right of the State of Kentucky, to interfere by way of taxation or otherwise, with the defendants right to trade or engage in interstate commerce, as stated in this answer.

Second: Defendant says that it is true, that during these years mentioned in the statement, it was the owner of the steamer, Russel Lord, steamer Pavonia, and of the Iverness, and it's said barges, in the year 1901, but denies that the said steamer Inverness, was of value at any time, since the defendant has owned it of the sum of $10,000, was not of a value exceeding $2500.00.

Defendant denies the allegation that the home port speaking, of said vessels during the years 1899, 1900, 1901, was at the
20 port of Paducah, and defendant denies the right of the State of Kentucky to assess any of said property for taxation, but says that said property was taxable, under the laws of the State of Illinois, and nowhere else where owner resided, at the time; it denies that same was subject to any taxation whatever, on the part of the State of Kentucky, during either of said years, 1899, 1900, 1901. It says that all of said property during these years, was assessed by the defendant in the State of Illinois, for taxation, and has been taxed, and defendant has paid taxes under the State of Illinois to said State and city of Chicago on all of said property, and denies the right of the State of Kentucky to subject same property to taxation. Defendant further answering says, that H. Baker, upon whom notice in this case was served, was, during the said years, 1899, 1900, the general managsr of the transportion department of said Ayer & Lord Tie Company, of it's said steamboats, Russel Lord, Pavonia, and in 1991 of steamer and it's barges Inverness, and for convenience sake, and under the act of Congress, said steamers were enrolled or registernd at the port of Paducah, Ky., and said Baker, being a resident of the State of Kentucky, in which ports it
21 is proper to register or enroll said boats.

Wherefore defendant prays that this proceeding be dismissed absolutely, and for costs and for all other proper relief.

CAMPBELL & CAMPBELL,
Att'ys for Def't.

The Exhibit "A" referred to in the foregoing answer, will be found copied on page 9, of this transcript.

Judgement of County Court.

This day the questions coming on to be heard by the court on the demurrer entered to the defendant's answer, the court being sufficiently advised, adjudges that said demurrer be overruled, to which plaintiff excepts, and the pl'ff declining to further plead elects to abide the demurrer, and thereupon the court dismissed the plaintiff's statement and action, to all of which the plaintiff excepts and prays an appeal to the circuit court of McCracken county, which is granted.

Afterwards to wit:—at the January term, 1903 of the McCracken circuit court, on the 7th day of January, 1903, the following order was made herein, viz:—

This day came pl'ff and filed demurrer to def't's answer. (See page 16) Exhibit "A."

22 The following is the demurrer referred to in the foregoing order, viz:—

Demurrer to Answer.

Pl'ff comes and demurs to the answer of the defendant herein, because it says same does not state facts sufficient in law to constitute a defense to plaintiff's petition herein.

COM'TH OF KY.,
By FRANK A. LUCAS,
Revenue Agent.

Afterwards to-wit:—at the same term of the above named court, on the 10th day of Jan., 1903, the following order was made herein, viz:—

Appeal Granted.

The pl'ff's demurrer to def't's answer heretofore filed herein, coming on to be heard and the court being sufficiently advised overruled said demurrer to which ruling of the court the pl'ff object- and except- and pray- an appeal to the court of appeals which is granted.

23 Afterwards to-wit:—at the same term of the above named court, on the 5th day of Feb., 1903, the following order was made herein, viz:—

This day the following judgement was filed herein, viz:—

Judgement.

This day this cause coming on to be heard, the court overruled the motion heretofore entered by defendant to approve its bond and transfer this case to the circuit court of the United States for

the western district of Ky., and dismissed the petition for said removal, said petition having been filed in this court as part of the record from the county court, to all of which the defendant objected and excepted. The court being sufficiently advised, then overruled the plaintiff's demurrer to the defendant's answer, to which the plaintiff objected and excepted, and the cause submitted to the court by agreement, and plaintiff declining to plead further, and electing to abide its demurrer to the answer of the defendant herein, it is therefore the judgement of the court that the statement of pl'ff herein be dismissed, to all of which the pl'ff objected and excepted at the time, and still objects and excepts and prays an appeal to the court of appeals, which is granted.

Afterwards to-wit:—at the same term of the above named court, on the 26th day of Feb., 1903, the following order was made herein, viz:—

This day came def't, and filed bill of exceptions, which was signed by the judge of this court, and the same is now made a part of the record of this action. And said def't entered motion and moved the court for a judgement against the pl'ff, Frank A. Lucas, for the cost of this action, and the court being advised overruled said motion, to which the def't objected and excepted.

The following is the bill of exceptions referred to in the foregoing order, viz:—

Bill of Exceptions.

Be it remembered, that on the trial of this case, and before the court had action on the demurrer to the def't's answer herein, the def't presented a bond, signed by the def't and H. Baker and James Campbell as sureties, and also presented to the court a petition for the transfer of this action to the circuit court of the United States, for the sixth circuit and western district of Kentucky, and moved the court to approve of said bond and permit said bond to be filed, and to permit said petition for transfer to be filed, and to transfer said action to said circuit court of the United States, for the sixth circuit and western district of Kentucky; that pl'ff objected to said motion to file said petition and transfer said action to the circuit court of the United States for the western district of Kentucky, and the court thereupon sustained the objections made by the pl'ff, and refused to transfer said action or permit said petition to be filed, to all of which the def't objected and excepted at the time and still excepts. Said bond, signed by the defendant and by H. Baker and James Campbell, it's sureties, is in words and figures as follows, to-wit:—

Know all men by these presents, that we, Ayer & Lord Tie Company principal and H. Baker and James Campbell as sureties are held and firmly bound unto the Commonwealth of Kentucky, Frank A. Lucas, revenue agent for the Commonwealth of Kentucky and to all others whom it may concern in the sum of three

hundred dollars, to which payment we bind ourselves and each o
us by these presents. Given under our hand this 8th day of Sep
1902.

The conditions of this obligation are these: The said Ayer & Lor
Tie Company, has applied to the county court in said county to r
move a certain cause pending in said court, wherein the Commo
wealth of Kentucky, Frank A. Lucas revenue agent for the Commo
wealth of Kentucky is plaintiff, and the Ayer — Lord Tie Company
the defendant, from said county court to the circuit court of th
United States for the sixth circuit and western district of Kentucky
Now if said Ayer & Lord Tie Company shall enter in the said ci
cuit court of the United States in the western district of Kentuck
on the 1st day of the next term thereof, a copy of the record of sai
suit and shall pay all the costs that may accrue or be awarded b
said circuit court, if it shall hold that the said suit was wrong
27 fully or improperly removed thereto, and shall also appea
and enter special bail in said circuit court in said suit, if specia
bail was originally required therein, then this obligation shall b
void, otherwise in full force.

AYER & LORD TIE COMPANY.
By H. BAKER, Ag't.

H. BAKER,
JAMES CAMPBELL,
Sureties.

Said petition for removal of said action to the circuit — of th
United States for the western district of Kentucky is in words an
figures as follows, to-wit:—

Now comes your petitioner, Ayer & Lord Tie Company, and state
that said Frank A. Lucas, the pl'ff in the aforesaid action who bring
this suit for the Commonwealth of Kentucky, is a citizen of the Stat
of Kentucky, that said cause can be fully and finally determined i
the United — circuit court for the sixth circuit and the western di
trict of Kentucky, that your petitioner Ayer & Lord Tie Company
is a citizen of the State of Illinois, is a corporation created by an
under the laws of the State of Illinois, a certified copy of the certifi
cate or charter is herewith filed as part hereof marked "A,
28 engaged in business under its charter in the State of Illinois
that the Commonwealth of Kentucky is one of the States i
the United States and is a State foreign to the State of Illinois, tha
the amount in controversy in the aforesaid cause amounts to mor
in value than the sum of two thousand dollars exclusive of interes
and cost.

And petitioner makes and files in this court a bond, with good
and sufficient security, for its entering in such circuit court on the
1st day of its next session, a copy of the record in said suit, and fo
paying all costs that may be awarded for said circuit court, if said
court shall hold that said suit shall be wrongfully or improperly
transferred thereto, and also for the appearing and entering of specia

bail in such suit if special bail was originally requisite therein, and they pray of said court to accept said petition and bond and order the transfer of said cause to the said circuit court of the United States. H. Baker says that he is the managing agent for the Ayer & Lord Tie Company, that the president and other officers of said company are beyond the county of McCracken, and that he believes the statements in the foregeing petition are true.

H. BAKER.

29 Sworn and subscribed to before me by H. Baker, this 8th day of September, 1902.

L. D. HUSBANDS, Judge.

Clerk's Certificate.

STATE OF KENTUCKY, County of McCracken, } *sct:*

I, H. H. Hobson, clerk of the McCracken circuit court, within and for the county and State aforesaid, do certify, that the foregoing twenty-eight typewritten pages and this page contains a full, true and complete transcript of the action therein named as the same appears of record and on file in my office.

Given under my hand as clerk of said court, this 10th day of Mar., 1903.

H. H. HOBSON, Clerk,
By —— ——, D. C.

Cost of record $9.20.

30 With the foregoing transcript the appellant filed a statement in the office of the clerk of the court of appeals in words and figures following to-wit:—

Court of Appeals of Kentucky.

COMMONWEALTH OF KENTUCKY, by FRANK A. LUCAS, Revenue Agent for the State at Large, Appellant,
vs.
THE AYER & LORD TIE COMPANY, Appellee. } Statement.

The judgement appealed from in this action was rendered at the January term, 1903, of the McCracken circuit court, and is found on page 23 of the record in this action. No summons or warning order is desired.

——— ———,
Revenue Agent.

Be it remembered that on the 21st day of May 1903 in the court of appeals of Kentucky at Frankfort the following order was entered to-wit—

COMMONWEALTH, by, etc., vs. AYER & LORD TIE CO. } McC.

"Came appellee by counsel and filed grounds and moved the court to grant an oral argument herein which motion is sub-
31 mitted.

And afterwards on the 22nd day of May 1903 at a court of appeals at the capitol at Frankfort the following order was entered to-wit—

COMMONWEALTH, Use, etc., vs. AYER & LORD TIE COMPANY. } McCracken.

"The court being sufficiently advised it seems to them the motion herein should be sustained, and case is therefore continued for oral argument.

And afterwards on the 20th day of October 1903 at a court of appeals at the capitol at Frankfort the following order was entered—

"COMMONWEALTH, etc., vs. AYER & LORD TIE COMPANY. } McCracken.

Came parties by counsel and on motion and by consent this case is passed on the argument *document*, from Nov. 17th to December 8th, 1903.

And afterwards on the 9th day of December, 1903 at a court of appeals at the capitol at Frankfort, the following order was entered—

"COMMONWEALTH vs. AYER & LORD TIE COMPANY. } McCracken.

This case coming on to be heard was argued by James
32 Campbell for appellee, and by Frank A. Lucas for appellant and submitted.

And afterwards on the 17th day of December 1903 at a court of appeals at the capitol at Frankfort the following judgement was entered to-wit—

ONWEALTH OF KENTUCKY, by, etc., Appellant, vs. AYER & LORD TIE COMPANY, Appellee. } Appeal *for* the McCracken Circuit Court.

he court being sufficiently advised it seems to them, the judget herein is erroneous.
is therefore considered that said judgement be reversed, and se remanded for proceedings consistent with the opinion herein. ich is ordered certified to said court. It is further considered t the appellant recover of the appellee its costs herein expended. d on said date the court delivered the following opinion :—

Court of Appeals of Kentucky.

(To Be Reported.)

DECEMBER 17, 1903.

MMONWEALTH OF KENTUCKY, by, etc., Appellants, vs. AYER & LORD TIE COMPANY, Appellee. } Appeal from McCracken Circuit Court.

3 Opinion of the Court by H. S. Barker, Judge.

This is a proceeding instituted by the auditor's agent, Frank A. ucas, against appellee, under the provisions of section 4241, Kenucky Statutes, to enforce the listing for taxation of certain steam oats owned by it, engaged in interstate commerce on the Ohio, umberland Tennessee and Mississippi rivers.

The appellee is a corporation organized under the laws of the tate of Illinois, having its principal office in Chicago; it also has offices in Paducah and other cities along the rivers upon which it engages in navigation. The steamboats in question are the Russel Lord, Pavonia and Inverness. The years, for which these vessels are sought to be listed for taxation, are 1899, 1900 and 1901. These are registered in Paducah, Kentucky, and each of them has painted on its stern, in compliance with the statutes of the United States, the words "of Paducah, Ky."

34 To the petition, appellee filed an answer, admitting that the vessels sought to be taxed are registered at Paducah, Ky., and that they have the words "of Paducah, Kentucky," painted on their sterns. Their values, as alleged in the petition, are denied, as is also the allegation that Paducah is their home port; and it is alleged, affirmatively, that appellee is an Illinois corporation, having its chief office and place of business in Chicago; that its vessels are engaged in inter-state commerce upon the rivers before men-

tioned; that they are taxed in Chicago, the domicile of their owner, and are not taxable by the State of Kentucky, in Paducah or elsewhere. The answer concludes with the following allegation:

"Defendant further answering, says, that H. Baker, upon whom notice in this case was served, was, during the said years, 1899, 1900, the general manager of the transportation department of said Ayer & Lord Tie Company, of its said steamboats, Russel Lord, Pavonia, and in 1901 of steamer and its barges Inverness, and for convenience sake, and under the act of Congress, said steamers were enrolled or registered at the port of Paducah, Ky., and said
35 Baker, being a resident of the State of Kentucky, and in which ports it is proper to register or enroll said boats."

To this pleading, a general demurrer was interposed by appellant, which was overruled, and declining to plead further, its petition was dismissed; from which judgement, this appeal is prayed.

The allegations of the petition, which are admitted by the answer, and the allegations of the answer, which are admitted to be true by the demurrer, aptly raise the question as to whether or not the steamboats of appellee are taxable by the Commonwealth of Kentucky.

Ordinarily, the residence of the owner is the situs for taxation of personal property; but this rule is, by no means, without exception, and it often happens that personal property obtains a situs of taxation in a jurisdiction foreign to the residence of its owner. Vessels engaged in navigation upon the high seas, and upon the Great Lakes and rivers of the United States, are often separated by long distances from the residences of their owners; such vessels, insofar as they are the property of citizens of the United States, are governed by its laws.

36 It has been deemed wise by the General Government, from the earliest period of its existence, that all vessels engaged in inter-state, or inter-national commerce, should have a home port, where they are registered and enrolled, enjoy certain privileges, and are subject to certain burdens and duties; and that all who have business transactions with them may know beyond question their home port, it is required by statute, that its name shall be painted in a certain way upon the stern of each vessel. By an act of Congress, which become a law Dec. 31, 1792, (sec. 4141, Revised Statutes) it is provided:

"Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection- district, which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

SECTION 4178. "The name of every registered vessel, and of the port to which she shall belong, shall be painted on her stern,
37 on a black ground, in white letters, of not less than three inches in length. If any vessel of the United States shall be

found without having her name and the name of the port to which she belongs so painted, the owner or owners shall be liable to a penalty of fifty dollars;"

SECTION 4334. "Every licensed vessel shall have her name, and the port to which she belongs, painted on her stern, in the manner prescribed for registered vessels; and if any licensed vessel be found without such painting the owner thereof shall be liable to a penalty of twenty dollars."

It will be observed, that by the foregoing statute, the home port of vessels belonging to citizens of the United States was the residence of the owner, if there was but one, or that of the residence of the vessel's husband, if there were more than one owner, and the name of this home port was to be painted on the stern of the vessel. Thus stood the law regulating this subject, until the year 1884, when, by an act of Congress, entitled "An act to remove certain burdens on the American merchant marine, and to encourage the Amer-
38 ican foreign carrying trade, and for other purposes," it was provided that the word 'port,' as used in sec. 4178 and 4334 of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of said vessels, shall be construed to mean, either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built; or where one or more of the owners reside." This changed the requirement, that the home port should be the residence of the owner, and granted the option of selecting one of three places as a home port, to wit: the port of registry, the place in the same district where the vessel was built, or where one or more of the owners reside. In 1891 and 1897, section 4178 was amended, so as to read as follows:

"The name of every documented vessel of the United States shall be marked upon each bow and upon the stern, and the home port shall also be marked upon the stern. These names shall be painted or gilted, or consist of cut or carved or cast Roman letters, in light color on a dark ground, or in a dark color on a light ground, se-
cured in place, and to be distinctly visible. The smallest
39 letters used shall not be less in size than four inches. If any such vessel shall be found without these names being so marked, the owner or owners shall be liable to a penalty of ten dollars for each name omitted:"

Appelle had a right to cause its boats to be registered at Paducah, although that was not the place nearest to the port where it resided, and it fully complied with the law regulating the subject, by painting the words "of Paducah, Ky.," on the sterns thereof; and by the amendment of 1884, Paducah became the home port of the vessels so registered and marked.

The question, then, for adjudication, is whether or not the home port of a vessel is the situs for its taxation, although its owner may reside in a foreign country or State, as in the case under consideration. Judson, in his work on Taxation, (section 186) says: "Steam-

boats and vessels navigating the public or navigable waters of the United States, are taxable as property, irrespective of the residence of the owner, in the home port of the vessels, which is said to be their situs for taxation." And in Cooley on Taxation, 3rd
40 edition, vol. 1, p. 651: "Vessels are commonly taxable only at the port of registry, although the place of enrollment or registration does not necessarily fix the situs for taxation, which may be at the owner's domicile, or in a State where the owner does not reside, if the vessel's business is wholly in such State for an indefinite period."

In the case of Hays *vs.* Pacific Mail Steamship Co., 17 How., 596, the Supreme Court of the United States said:

"The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another State is familiar in the admiralty law. She is subjected in many cases, to the application of a different set of principles. 7 Pet., 324; 4 Wheat., 438."

"We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation, they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their situs at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where
41 the taxes had been paid."

In the case of Moran *v.* New Orleans, 112 U. S., 653, it was said:

"And it is undoubtedly true, as it has often been judicially declared, that vessels engaged in foreign or interstate commerce and duly enrolled and licensed under the acts of Congress, may be taxed by State authority as property; provided, the tax be not a tonnage duty, is levied only at the port of registry and in valued as other property in the State, without unfavorable discrimination on account of its employment. Transportation Co. *v.* Wheeling, 99 U. S. 273; Morgan *v.* Parham, 16 Wall. 471; Hays *v.* Steamship Co., 17 How. 596; Ferry Co. *v.* East St. Louis, 107 U. S. 365."

(See, also, Battle *v.* Mobile, 9 Ala. 234; Irvin *v.* St. Louis and C. R. R. Co., 94 Ill. 105; People *v.* Pacific Mail Steamship Co., 58 N. Y. Rep. 242; City of Newport *v.* Berry, 14 K. L. R. 29.)

The steamboats involved in this litigation are separated from the residence of their owner by a long distance; in fact, they can never visit the port at which their owner resides; they are, so far
42 as their actual situs is concerned, permanently confined to the rivers over which they float; if their home port had to be Chicago, because that is the residence of their owner, as under the law prior to 1884, then, they would have a home port from which they could derive no advantage or protection, because they could never reach it. It was to obviate this hardship, with others, that the act of 1884 was passed by Congress, permitting their owners to select for them a home port in the field of their operations, which

s for them a home port in fact, as well as in law and name. Prop-
rty, such as that under consideration, ought, logically, to be taxed
t its own home port: there it can be seen and properly valued for
ssessment by the fiscal officers; whereas, at the residence of its
wner (Chicago) the officers, of necessity, must rely on the state-
ments of the owner for both the existence of the property and its
alue. At its home port, it enjoys the protection of the laws of the
risdiction in which it is located, and both justice and reason
ould seem to require that property, thus permanently located, both
n legal contemplation and in fact, within a jurisdiction foreign to
that of its owner, should contribute its fair share to the sup-
3 port of that government whose protection it enjoys.

We conclude, therefore, that as Paducah, Ky., is the home
ort of the vessels in question, that place is their situs for taxation,
nd the demurrer to the answer should have been sustained.

There is no pretense in this case, that appellee's property is sought
o be taxed in a manner different from that in which all other prop-
rty in Kentucky is taxed, or that there is any unjust or invidious
iscrimination between it, and property of the citizens of Kentucky.

There was a petition and bond tendered in the county court where
his proceeding originated, and a motion to remove it to the Federal
ourt, on the ground of diversity of citizenship between appellee and
he Commonwealth of Kentucky. This motion was overruled, and
orrectly so; the Commonwealth of Kentucky is not a citizen with-
n the meaning of the statute authorizing the removal of causes from
he State to the Federal court, on the ground of diversity of citizen-
hip. (Chicago, St. Louis and New Orleans R. R. Co. *v.* Common-
ealth, 24 K. L. R. 2124.

For the reasons indicated, the judgment is reversed for proceed-
ngs consistent with this opinion.

4 & 45 And afterwards on the 12th day of January 1904 at a court of appeals at the capitol at Frankfort the following rder was entered—

COM'TH OF KY., by FRANK A. LUCAS, Rev. Ag't, *vs.* AYER & LORD TIE COMPANY. } McCracken.

Came appellee by counsel and on its motion is given 30 days additional time to file a petition for rehearing.

And afterwards on the 12th day of February 1904 at a court of ppeals at the capitol at Frankfort the following order was entered—

"COM'TH OF KY., ETC., *vs.* AYER & LORD TIE CO. } McCracken.

Came appellee by counsel and filed a petition and moved the ourt to grant a re-hearing which motion is submitted.

The petition for re-hearing is in words and figures as follows:

46 Petition for Rehearing.

We have carefully read and considered the opinion of this court rendered in this action on December 17, 1903. We are constrained to differ so materially with the court, that we have ventured upon a petition for re-hearing, being well aware of the usual fate that awaits these documents.

But, in excuse, we must refer the court to the fact that this case presents questions that are entirely novel, new to this court: That the effect of the court's decision if followed by other jurisdictions will be so far reaching, upsetting a long line of decisions, and preconceived ideas maintained by the bench and bar, that most respectfully we take the liberty, in this petition of again asking this court to re-consider its action had on December 17, 1903.

We invite the court's attention to the issues made by the statement filed under the statute, by the appellant, and to the answer filed by the appellee. By the statement it substantially alleged that
47 the appellee during the years named therein was a corporation, with its office located in McCracken county, Kentucky, and was the owner of the different boat property and barges, upon which a valuation is set in the statement; and the assessment and valuation of the property is asked for those years, for State, county and municipal taxation, and the 20 per cent. penalty due to the auditors agent, and this request is made because appellee has failed so to assess its property—that the boats were enrolled at Paducah, and the words Paducah, Ky., painted on their stern.

The answer takes issue with the appellant in its statement as to valuation of its property, as to its having no other office but the one in Paducah, McCracken, county, Ky. It alleges that it is a corporation created under the laws of the State of Illinois, files its certificate of incorporation from the secretary of that State, that it is and was, during the years named in the statement engaged in interstate commerce, that the boats were duly licensed under United States laws:—It is also alleged that the appellee had an office at Duval's Bluff, Ark; Brookport, State of Ill.; Evansville, State of Ind.; St. Louis, Mo.; Paducah and Fulton, Ky., and at Chtcago, Ill.; that its main and principal office was and is in this last named city,
48 of which city and State it was and is a citizen and resident; where it was assessed on said property and paid its taxes; that their different boats and barges were used by appellee in transporting ties from places on the Ohio, Tennessee and other rivers to Brookport, Illinois; Duvall's Bluff, Arkansas; and St. Louis, Mo., and Evansville, Indiana: that said boats came to Paducah only temporarily, touching only to purchase supplies, employ its crews, and never to receive or discharge its load.

To this answer, a demurrer was filed in the county court, and the same was overruled, and an appeal prayed by the appellant, to the circuit court when its demurrer was considered by this last named

ourt, and overruled, and its statement dismissed—to which exceptions were entered, and an appeal prayed and prosecuted to this ourt. The demurrer confessed the truth of these allegations of fact, nd denial, stated in the answer. The court must have overlooked he allegation in the answer of the existance of a state of facts that ntirely puts beyond question that the appellee's property had ever become incorporated into the property of the State of Kentucky, that its temporary visits to the port of Paducah, were merely for supplies and men within the principles announced by the U. S. Supreme Court in Hays *vs.* Pacific Mail Steam-ship Co., 17th Howard 506, placed it beyond the taxing power of the State of Kentucky.

We have then under the pleadings of this case, this presentation, pon which the court rested its opinion that Paducah, Kentucky, vas the home port of these boats of appellees, and their situs for axation. The bare facts of the enrollment of appellee's boats at Paducah, and painting the name of that city upon the stern of it's essels notwithstanding the facts alleged and not denied, that the aid boats were, and are owned by the appellee alone; an Illinois orporation, located in Chicago, in that State, where its principal ffice is and was, and that its boats touched at the city of Paducah, Ky., only temporarily; never receiving or discharging their cargo.

This conclusion we dominate a radical departure. The record in his case and the court's opinions, present Federal questions of the gravest moment. And we invite the court's attention to a question, that threatens to become a cause celebre.

It is conceded by the court in its opinion that the situs for he purpose of taxation of this property is its home port. And the ourt holds that the owner can fix the home port of his property by ainting on the stern of his vessels, the name of the place in the ame district where she was built, or where she is registered or enrolled, or where one or more of the owners reside, and that because he name of the city of Paducah, Ky., was painted on the stern of ppellee's vessels, that under the act of Congress passed in 1884, mending section 4178 and 4334 of Revised Statutes of the United States, Paducah became the home port of appellee's vessels and their itus for taxation.

And this brings us to the consideration of the different acts of Congress controlling this case. They are sections 4141, 4178, and 4334, and what your honors denominate as the acts of 1884 and 1894. These acts read, as follows:

Section 4141. "Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district, which included the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at, or nearest the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel usually resides."

Section 4178. "The name of every registered vessel, and of the

port to which she shall belong, shall be painted on her stern, on a black ground, in white letters, of not less than three inches in length. If any vessel of the United States shall be found without having her name and the name of the port to which she belongs so painted, the owner, or owners, shall be liable to a penalty of $50."

Section 4334. "Every licensed vessel shall have her name, and the port to which she belongs, painted on her stern, in the manner prescribed for registered vessels; and if any licensed vessel be found without such painting, the owner thereof shall be liable to a penalty of $20."

Acts, 1884. "The word 'port,' as used in sections 4178 and 4334 of the Revised States, in reference to painting the name and port of every registered or licensed vessel on the stern of said vessels, shall be construed to mean, either the port where the vessel is reg-
52 istered, or enrolled, or the place in the same district where the vessel was built, or where one or more of the owners reside."

Acts, 1894. "The name of every documented vessel of the United States shall be marked upon each bow and upon the stern, and the home port shall also be marked upon the stern. These names shall be painted or gilted, or consist of cut, or carved, or cast Roman letters, in light color on a dark ground, or in a dark color on a light ground, secured in place, and to be distinctly visible. The smallest letters used shall not be less in size than four inches. If any such vessel shall be found without these names being so marked, the owner, or owners shall be liable to a penalty of $10 for each name omitted."

Section 4141, in all cases, "except as is hereinafter provided," makes it mandatory, that every vessel shall be registered by the collector of that collection district, which includes the port, "to which said vessel shall belong."

It then becomes necessary to locate or specify the port "to which said vessel shall belong." This is done in the remaining part of the section, which is applicable to the case, at bar, reads, as follows:

"Which port shall be deemed to be that at, or nearest to
53 which the owner, if there be but one, usually resides."

Section 4178, makes it mandatory upon the owner to have the name and port of his vessel painted on her stern. Sections 4141 and 4178 are very old laws, having been passed by Congress in 1792. It became highly necessary that Congress should pass a law defining what was the home port of a vessel. Before the adoption of the Constitution, the admiralty law, as practiced and understood in continental Europe, differed in some respects, from the same as practiced and understood in England. By both laws, a vessel as such, *eo nomine*, could be emparled, seized and sold under decree of court. That a thing could be sued was unknown and anomalous to the common law. Hence a feeling of jealously arose between the high court of admiralty in England, and the common law courts. The common law courts succeeded in confining the admiral's jurisdic-

tion to the ebb and flow of the tide. Across the channel in Europe, the admiralty jurisdiction embraced the seas and all navigable waters. In England the doctrine became firmly established that there was no lien on a vessel for supplies furnished, and repairs done to her in her home port.

54 Across the channel, a lien existed against a vessel for supplies furnished to the vessel, irrespective of the port where furnished, same being a maritime contract capable of being enforced by process *in rem* against the vessel. The Constitution of the United States conferred upon, or recognized the exclusive admiralty jurisdiction of United — court, article 11, sec. 2. For a number of years after the adoption of the Constitution, in the Thomas Jefferson and other cases, the Supreme Court held to the English rule that the admiralty jurisdiction of the United States court was confined to the ebb and flow of the tide. Then there were enacted laws in many of the States providing for the enforcement of liens given by the State statutes in the State court by imparling the vessel and owners.

These laws were acquiesced in; vessels were sold by sheriffs and commissioners of the court, until the great case of Hine *vs.* Trevor was decided by the Supreme Court of — United States, which was followed by other decisions, firmly establishing the doctrine that the admiralty jurisdiction of the United — court extended to all the navigable waters and rivers of this country. These State

55 statutes, above alluded to, were all held to be unconstitutional.

There remains, then, another vexed quesion: That of a lien for supplies furnished to a vessel in her home port. Many admiralty lawyers, as well as many of the United States district courts were of the opinion that the rule obtaining to Europe, that there was a lien on the vessel for supplies furnished her in her home port, was the law of this country. The question finally came before the Supreme Court and was decided by that court in the famous case of the General Smith (A. D. 1819), 4th Wheaton, 438. In that case, the English law was followed and it was adjudged that there was no maritime lien enforceable in admiralty against a vessel for supplies furnished in the home port. This case has never been overruled, although questioned by the district courts. Finally, the Supreme court in the Lottawanna, 88 U. S., 520, and the Edith, 94 U. S., 518, have re-affirmed the Smith case. Thus we see the doctrine firmly established that there is no maritime lien for supplies furnished to a vessel in her home port. Congress, by the act of 1792, (sec. 4141, Rev. Stat. U. S.), defined where this home port was.

56 The Supreme Court, as we will see, has uniformly adhered to this definition of the home port, contained in sec. 4141, and will do so unless the Supreme Court, following your honor's opinion, determines that this matter of the home port of a vessel can be at the caprice of the vessel owner, fixed at a place in the same district

where she was built, or where one or more of her owners reside, or the port where the vessel is registered, or enrolled.

So, following the reason of the doctrine of the General Smith in the case of the Mono-gahala Navigation Company *vs.* The Bob Connell, 1st Federal Rep., 218, the court held that a claim for lockage on a navigable river is maritime, and cognizable in admiralty, but, when it appears that the service was rendered in the home port, the general maritime law did not give a lien. Let us stop and contemplate the effect that this ruling will have on the question of lien for supplies in the home port. The maritime lien is denied because the supplies being furnished where the owner resided, it is conclusively presumed it was done on his credit alone. Now, by this new interpretation of the law, we have the anomalous presentation of
57 a vessel built and launched and equipped, and setting sail at New Albany, Indiana, from Howard's ship yard and landing, destined for the port of New Orleans, La., to run alone in the lower Mississippi trade, never returning, or never expecting to return to New Albany, Indiana, with the name of New Albany painted on her stern (where she was built), contracting debts for supplies and repairs furnished and done to, and on her, in the port of New Orleans, where the owner resides, and is well known to the creditor who furnishes the supplies. He, (the creditor), has a maritime lien for these supplies, and enforces it by libel against the vessel in the United States district court at New Orleans. The owner cannot be heard to say that New Orleans is the home port of the vessel, and no maritime lien exists.

Or, to go a little further, suppose this vessel should return to New Albany, and while there contract debts for supplies and repairs. Has the creditor under the principles announced in the General Smith, a maritime lien for these supplies furnished to the vessel when in New Albany? If the construction given by your honors is correct, we would ask what becomes of the doctrine announced by the Supreme Court
58 in the General Smith, 4th Wheaton, 438., Peyroux *vs.* Howard, 7 Pet. 324., the Edith, 94 U. S., 518, and many other decisions along the same line. Did Congress contemplate any such radical change? And yet, how can such change be avoided if the owner, at his pleasure, can fix his home port in either of three ways authorized by the statute of 1884? To further illustrate, the appellee is the owner of some three or four steam-towboats, being a corporation "and able to migrate," was built, as we are informed, in Pittsburg; the second, third and fourth, perhaps in different places. On the stern of it's Pittsburg boat, it has painted the name of that city, and *eo instanto* Pittsburg becomes its home port, it's situs for taxation. And so as to it's three other boats on which are painted the names of the respective cities where built, Paducah being one of them. Then we have the anomalous presentation of one and sole owner appellee of four different steam towboats—each having a separate home port, and the situs of their taxation fixed by this

ourt's decision at the four different cities, whose names are painted n the separate sterns of the tow-boats.

What becomes of the controlling reason lying as the basis
9 of the decision of the General Smith, the Edith, etc., to-wit: That supplies furnished to, and repairs done on a domestic essel, in her home port, are not maritime liens because conclusively resumed to be done and furnished on the sole credit of the boat wner, he being a resident of that port. When this owner has four orts for his vessels, and only one port at which he resides, and that ne neither one of the four. Again, the construction placed by your onors upon the act of 1884, would produce confusion in reference o the recording of bills of sale and mortgages of vessels. By an act f Congress, passed July 29, 1859, it is provided:

"That no bill of sale, mortgage, hypothecation or conveyance of ny vessel, or part of vessel, of the United States, shall be valid gainst any person other than the grantor, or mortgagor, his heirs nd devisees, and persons having actual notice thereof, unless such ill of sale, mortgage, hypothecation or conveyance, be recorded in he office of the collector of customs where such vessel is registered r enrolled." The court *In re* White's Bank *vs.* Smith 74, U. S., 211, referring to this act, adds:

60 "The next section provides for recording these bills of sale, etc., and also certificates of discharge and cancellation n a proper book. No provision was made for any authentication f these instruments preparatory to their being recorded. They ere received by the collector from the parties delivering them, nd were recorded, with no proof of their verity, except from the xecution of the same, as appeared on their face; and this, both as t respects the bills of sale, mortgages, etc., and the discharge and ancellation of the same. And the law thus stood for some fifteen ears. On March 3, 1865, it was enacted that "no bill of sale, mortgage, hypothecation conveyance or discharge of mortgage, or other ncumbrance of any vessel, shall be recorded unless the same is duly cknowledged before a notary public, or other officer authorized to ake acknowledgment of deeds." 7th Wallace, 74, U. S., 211., White's Bank *vs.* Smith.

This act was before the Supreme Court for construction *In re* White's Bank *vs.* Smith, 74, U. S., 211, and it was then held that bills of sale of, and mortgages on such vessels, should be re-
61 corded in the home port of the vessel, where the vessel was permanently registered or enrolled. If it is competent for he owner to change his home port from that where she was permanently registered, and which as held in the case of White's Bank s. Smith, under sec. 4141, Revised Statutes, is the place where the wner, if one, usually resides, then no longer does sec. 4141 govern s to the place of recording bills of sale and mortgages of vessels. The result would be those doing business with a vessel as purchaser, nortgage creditor, or otherwise, would be called on to look up the

records in the collector's office in all the places designated in the act of 1884, as places that can be painted on the stern of the vessel.

We submit, it would be hazardous to one's interest to deal with vessels by way of mortgage, or hypothecation, or to acquire title by bill of sale. Again we inquire: Is it fair to presume that Congress, by the passage of the act of 1884, intended to make this change in the law, and impose these burdens on ship owners and creditors?

The question has frequently been before the Federal courts involving the claims of material men, and the right of taxation
62 of vessels, and as to whether the place where the vessel is registered, or enrolled, determines the home port.

In the Jennie B. Gilkey 19th Federal Rep. 128, Judge Lowell, circuit judge, used the following language: "It has ofter been decided that the place of residence of the owners is to be considered the home port, even when the registration is in another State, if the facts of ownership and residence were known, or might have been known, to the material man. (The Golden Gate, Newb., 308. The Albany 4th Dill., 439. The E. A. Barnard, 2 Fed. Rep., 712. The Mary Chilton, 4 Fed. Rep., 487.)"

So, in the leading case of The City of St. Louis *vs.* The Wiggins Ferry Company, 11 Wallace, 423, the Supreme Court held that the property of the Wiggins Ferry Company, an Illinois corporation was taxable in Illinois, and not in the city of St. Louis, Mo., notwithstanding the fact that the vessels of the ferry company were registered or enrolled in the city of St. Louis, Mo. It was found in that case that altho' the Wiggins Ferry Co. operated and used a number of steam-boats in its ferry business from the port of St. Louis to and from the State of Illinois opposite, and had an
63 office in Illinois, and also in St. Louis, Mo., and its vessels were enrolled in St. Louis, yet, as the property had not actuall- become incorporated into the property of the State of Missouri, the situs of taxation was Illinois. That court, per Swayne justice, used the following language: "The boats are enrolled at the city of St. Louis, but that throws no light upon the subject of our inquiry. The act of 1789, sec. 2, 1 Stat. at L., 55, and the act of 1792, sec. 3, 1 Stat. at L., 287, require every vessel to be registered in the district to which she belongs, and the 4th section of the former act, and the 3rd section of the latter, declares that her home port shall be that at, or near, which her owner resides. The solution of the question, where her home port is, when it arises, depends wholly upon the locality of her owner's residence, and not upon the place of her enrollment. 3 Kent Com., 133 170; Hill *vs.* The Golden Gate, Newb., 368; Superior, Newb., 181; Jordon *vs.* Young, 37 Me., 27 29.

Now, we inquire: Is it not as much imperative on the owner to register his vessel in her home port, as it is by sec. 4178, to have the name of the home port painted on her stern? In other
64 words does not the act of registering the vessel determine her home port equally as much as the act of painting the name of the place upon the stern of the vessel? Both are made impera-

tive upon the owner. And yet, as held by that court, the place of the enrollment of the vessel throws no light on the subject as to where is her home port, and the situs of taxation.

Then we inquire: Why are these things required to be done? Counsel for the plaintiff in error, *In re* The City of St. Louis *vs.* The Wiggins Ferry Company, *supra*—was careful to state to the court in his brief, that: "It is not claimed that the enrollment of these ferry boats at the port of St. Louis is conclusive as *the* the situs of the property. The enrollment simply indicates the domicil or home port of the vessels, and it is a circumstance to be considered in connection with the other facts in the case, in determining the question at issue." See epitome of argument in said case.

So in the Jennie B. Gilkey, 19 Fed. Rep., 128 (*supra*), the court approved and referred to the decision rendered by Judge Clifford in the Martha Washington, 1 Clifford, 463, that the object of the
65 statutes in requiring the name of the port of registry to be painted on her stern was to give notice to those interested, of the home of the vessel. But this notice was no more complete, than the registry and enrollment, which by act of Congress is required to be framed and hung in a conspicuous place in the boat's cabin, and which shows in which port she is registered, or enrolled. Parties dealing with her can read the name on her stern, and then go on the vessel, and in her cabin read where she is registered, or enrolled. And yet, in view of all these facts, the Supreme Court in the Wiggins Ferry Co. case, was emphatic in saying that the place of her enrollment (and we might add, the name painted on her stern), "threw no light upon the subject then being inquired into," to-wit: the all important question of the situs of taxation of steamboat property.

And let us inquire: Why should not that court refuse to regard these questions, when the principle was so well known to the court, that the law governing personal property was the law of the residence of the owner, as regards taxation and in other respects? The policy of the law is that there must be a fixed place where the
66 owner of personal property is called upon to assess and pay taxes on same; and that is the place of his residence. Unless by his own act, he takes this particular personal property and incorporates it into the property of another State.

And yet, under your honors' ruling in this case, this elementary doctrine, so rigidly adhered to by the Supreme Court, of the actual residence of the boat owner, fixing the situs of the boat's taxation, is entirely overthrown, and that because Congress has amended sec. 4178, (and not 4141, wherein the home port is defined), by the act of 1884, "in reference to painting the name and port of every registered, or licensed, vessel on the stern of said vessels, and has given to the boat owner the right to paint the name of (1), the port where the vessel is registered, or enrolled, or (2), the place in the same district where the vessel was built, or (3), the place where one or more of the owners reside."

This court thereby determines that because the name of Paducah, Ky., was painted on the stern of appellee's boats, that it thereby shifted its place of taxation. In other words, that the mere physical act of painting the name on the boat's stern, changed
67 the law that the actual residence of the owner controls the situs of the taxation of his personal estate.

The attention of your honors is referred to the case of the Mary Chilton, 4 Fed. Rep., 847, opinion by Judge Choate. The facts disclosed that the name painted on the stern of the vessel was New London, and the owner's residence was New York city. That fact did not prevent the court from holding that the owner's place of residence was the home port of the vessel; that there was no lien for supplies furnished to her in New York. This case is quite in point, and was decided years after the adoption of the act of 1792.

But what is the proper construction to place on the act of 1884? The law as it existed in 1884, permitted ship owners, or the owners of vessels engaged in domestic commerce, to procure temporary enrollment papers, in ports other than where she was permanently enrolled, 1 Parsons Shipping and Admiralty, sec. 4, page 37, under the title "Of the effect of registry and enrollment," speaking of vessels registered, or enrolled under the act of 1792 and 1793.

68 "The statutes of registry and enrollment are now somewhat numerous and complicated; and those of 1792 and 1793 are very long, and go into a great variety of details. For these we must refer to the appendix, where will be found all these statutes. Here we only remark, that enrolled vessels must be licensed annually for the employment or business in which they are to engage, and this is stated in the license, and they are not authorized by it to engage in any other; and if they be found with a forged or altered license, or making use of a license granted to any other ship, or vessel, the vessel and cargo are forfeited.

If they are in a port other than that to which they belong, at the time when their license expires, they may there obtain temporary registers."

And again, the same author on page 35, says:

"Any vessel which is entitled to registry, and is in a district other than that to which she belongs, may be registered in that district. This, however, is only a temporary register, and must be surrendered and cancelled when she arrives in the district to which she belongs, and a permanent register granted."

69 There has been no change, as we have discovered, in reference to the subjects treated of above by the learned author in his valuable work. Thus, exigencies of trade moved Congress to pass laws permitting temporary enrollments. So, manifestly, Congress by the act of 1884, intended that the owner, for purpose of commerce, and in furtherance of his business, might paint the name of the headquarters of his vessels on their stern, and not be restricted to the place of his residence. This was evidently not intended to alter the home port, either on the subject of taxation, or

r supplies furnished to her, or for purposes of recording bills of
le and mortgages.

To illustrate: Vessels owned at Pittsburg, may be placed by their
wner- in the trade up the Cumberland or Tennessee, or Mississippi
vers. Here they may engage in a profitable business. When their
enses expire, they can be enrolled at Paducah, or St. Louis, and
is enrollment, although called temporary, may exist until the
essel returns, if ever, to her home port of Pittsburg. To have
ne vessel enrolled in one city, and the name of another city painted
on her stern, might produce confusion. Hence, in order that
0 the public may know her headquarters, and where her owner
is ready to settle or transact her business, the name of this
lace of enrollment is painted on her stern.

Vessels are tramps. They are made "to plow the seas, and not
o rot at wharves." Their business headquarters change. Those
who deal with them, wish to know where to find them. Hence one
f these places named in the act of 1884, that can be painted on
her stern, is the place of her enrollment. Now this place of enroll-
ment evidently was not intended to be the place of her permanent
enrollment, for the reason that the third place named, to-wit:
"where one or more of her owners reside," is substantially the same
as sec. 4141, U. S. Rev. Stat. In other words, that either the place
where she is temporarily enrolled, or the place where one or more
of her owners reside, and where under sec. 4141, "she must be
permanently registered, or enrolled, or the place in the same district
where she was built, can be painted on the stern of the vessel."

Your honors seem to conclude, because the act of 1884 was passed
amending sec. 4178, that it operated to repeal sec. 4141, de-
71 fining, as interpreted by the courts, the home port of the ves-
sel. We think they can be harmonized as above set forth by
us. Repeals by implications are not favored. Had Congress in-
tended to repeal or amend sec. 4141, would it not have so declared?

Your honors refer to later acts, that of 1891 and 1897, quoted in
this petition, as strengthening the position of the court. The act
says the name of the home port shall be painted on all documented
vessels. This, we think is nothing more than re-affirming sec. 4141,
wherein the home port is defined as being that of the owner's resi-
dence, if only one owner.

We trust that your honors will sustain the appellee's motion.

Respectfully,

AYER & LORD TIE COMPANY,
By CAMPBELL & CAMPBELL, Attorneys.

Commonwealth of Ky. *vs.* Ayer & Lord Tie Company. Exhibit "X." Filed June 4, 1904. H. H. Hobson, clerk.

72 And afterwards on the 18th day of March at a court of ap-
peals at the capitol at Frankfort, the following order was
entered towit:

"COM'TH, by, etc.
vs.
AYER & LORD TIE COMPANY. } McCracken

The court being sufficiently advised it is considered that appellee's petition for re-hearing be and the same is overruled.

"Response is delivered."

And on said date the following response was delivered to the petition for re-hearing:

Court of Appeals of Kentucky.

MARCH 18, 1904.

COMMONWEALTH, by, &c., Appellants,
vs.
AYER & LORD TIE COMPANY, Appellee. } Appeal from McCracken Circuit Court.

Response to Petition for Rehearing, by Judge Hobson.

Section 4141, Revised Statutes of the United States, provides that the home port of vessels should be that at, or nearest to, which the owner, if there be but one, usually resides. Section 4178 and
73 4334 that the name of this home port should be painted on the stern of the vessels, with appropriate penalty for disobedience. The act of 1884 prescribes that the word "port," as used in section 4178 and 4334, in reference to painting the name and port of registered or licensed vessels on their sterns, should be construed to mean, either the port where the vessel is registered or enrolled, the place in the same district where the vessel was built, or where one or more of the owner's reside.

The argument of counsel for appellee, that the act of 1884, while changing the meaning of the word "port" in sections 4178 and 4334, left it unchanged, as used in section 4141, amounts to this:

That the Congress of the United States, after a policy continued throughout a century, requiring the name of the home port to be painted on the stern of the vessels, suddenly changed that policy, without any apparent reason, and permitted the name of a port, which was not the home port, to be painted thereon.

We think that Congress required the name of the home port to be painted on the stern of the vessel for a wise and useful
74 purpose, enabling all persons, who had dealings with them, to know where they belonged; and we are not willing to lightly adopt a construction, that it was intended by the act of 1884 to leave the place where the owner resides as the home port of the vessel, and yet permit the name of another port to be painted upon the stern. This construction would not only fail to enable persons dealing with vessels to know, of certainty, their home port, but it

would absolutely mislead, by permitting false information to be hung out under governmental sanction.

Petition for re-hearing overruled.

75 Please Before the Honorable the Court of Appeals of Kentucky, at the Capitol at Frankfort, on the 22nd Day of March, 1905.

THE AYER & LORD TIE COMPANY, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, by Frank A. Lucas, Appellee.
} Appeal from the McCracken Circuit Court.

Be it remembered that heretofore to-wit, on the 2nd day of December 1904, the appellant by its attorney filed in the office of the clerk of the court of appeals a transcript of the record which is in words and figures as follows towit:

Please Before the Hon. W. M. Reed, Judge of the McCracken Circuit Court, at the Court House, in the City of Paducah, Ky., on the 4th Day of June, 1904.

COMMONWEALTH OF KENTUCKY, by FRANK A. Lucas, Revenue Agent, Plaintiff,
vs.
AYER & LORD TIE COMPANY, Defendant.
} Petition Ordinary.

Be it remembered that heretofore an appeal was taken by the plaintiff, from the judgement of this court, rendered on the
76 first trial of this action, and a transcript of the record of this action, of said first trial, is now on file in the clerk's office of the court of appeals.

The following proceedings have been had herein, since this action came from the court of appeals, as follows, viz:—

At the April criminal term, 1904, of the above named court, of the 14th day of April, 1904, the following order was made herein, viz:—

Ordered that this action be reinstated on the docket, and the following mandate was filed herein, viz:—

Mandate.

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals, December 17th, 1903.

COMMONWEALTH OF KENTUCKY, by, &c., Appellant. *against* AYER & LORD TIE CO., Appellee.	Appeal from a Judgement of the McCracken Circuit Court.

The court being sufficiently advised, it seems to them the judgement herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for proceedings consistent with the opinion herein.

Which is ordered to be certified to said court.

A copy.
Attest:
Issued April 13th, 1904.

J. MORGAN CHINN, C. C. A.
By H. L. EVANS, D. C.

77 In pursuance to the foregoing mandate, it is ordered by the court that the judgement of this court, rendered herein be and the same is now set aside, and a new trial is granted herein.

Afterwards to wit:—At the April civil term of the above named court, on the 28th day of April, 1904, the following order was made herein, viz:—

This day came plaintiff, and filed copy of opinion and response to petition for re-hearing of court of appeals, and also filed brief of said pl'ff.

The following is the opinion and response to petition for re-hearing of court of appeals referred to in the foregoing order, viz:—

(For opinion see page 32.)

Court of Appeals of Kentucky.

MARCH 18, 1904.

COMMONWEALTH, by, &c., Appellants, *vs.* AYER & LORD TIE COMPANY, Appellee.	Appeal from McCracken Circuit Court.

78 Response to Petition for Rehearing by Judge Hobson.

Section 4141, Revised Statutes of the United States, provides that the home port of vessels should be that at, or nearest to, which the

r, if there be but one, usually resides Section 4178 and 4334
re that the name of this home port should be painted upon the
of the vessels, with appropriate penalty for disobedience. The
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and 4334, in reference to painting the name and port of regis-
or licensed vessels on their sterns, should be construed to
either the port where the vessel is registered or enrolled, the
in the same district where the vessel was built, or where one
ore of the owners reside.

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gress of the United States after a policy continued throughout
ntury, requiring the name of the home port to be painted on
the stern of the vessels, suddenly changed that policy, without
any apparent reason, and permitted the name of a port, which
was not the home port, to be painted thereon.

e think that Congress required the name of the home port to
ainted on the stern of the vessel for a wise and useful purpose,
oling all persons, who had dealings with them, to know where
belonged; we are not willing to lightly adopt a construction,
it was intended by the act of 1884 to leave the place where the
er resides as the home port of the vessel, and yet permit the
e of another port to be painted upon the stern. This construc-
would not only fail to enable persons dealing with vessels to
w, of certainty, their home port, but it would absolutely mis-
l, by permitting false information to be hung out under govern-
ntal sanction.

etition for re-hearing overruled.

CAMPBELL & CAMPBELL,
For Appellee.

RANK A. LUCAS,
For Appellant.

The folllowing is the brief of pl'ffs, referred to in the foregoing
ler, viz:—

Brief of Pl'ffs.

This cause is now before this court, the former action of this court in overruling plaintiff's demurrer to defendant's swer having been reversed by the court of appeals and the case nanded to this court for further proceedings not inconsistent with e opinion of that court herein. A copy of this opinion of the court appeals and the response of said court to defendant's petition for re-hearing are filed in the papers herein.

As will be seen from an examination of said opinion, the court of peals very carefully considered all the defenses raised by the defend-t's answer herein, and finding none of them good, said in its opinion

that, "the demurrer to the answer should have been sustained." This court, then, of course, will not hesitate to now sustain plaintiff's demurrer to said answer, and no further answer or other defense having been tendered by the defendant, we think nothing remains except to take the allegations of plaintiff's petition for confessed and to render judgment according to the prayer thereof.

Respectfully submitted, FRANK A. LUCAS,
Revenue Ag't.

81 Afterwards towit—at the same term of the above named court, on the 4th day of June, 1904, the following order was made herein, viz:—

Judgement.

This day the following judgement was filed herein, viz:—"This day this cause was submitted to the court without intervention of the jury. Then came the defendant, and on its motion filed as part of the records of this action, its petition for re-hearing on the trial of this action, in the court of appeals of Kentucky, marked Exhibit "X." And defendant moves the court to state its conclusion of facts separately from its conclusion of law, and this case coming on for hearing, upon the pleadings and mandate and opinion of the court of appeals, filed herein, and the defendant's petition for re-hearing filed herein, it is the judgement of the court that the demurrer to the defendant's answer herein, be now sustained, to which the defendant excepts, and the defendant declining to further plead, the allegation of plaintiff's statements are taken for confessed, and it is adjudged the property therein described is liable for taxation, as therein set forth, and to be omitted from assessment, to which defendant excepts. Then came plaintiff and moved to remand
82 this cause to the McCracken county court, for the purpose of having that court fix the assessible value of the omitted property, and assess same, and the court being sufficiently advised overruled said motion to which plaintiff excepted.

Then came the parties, and it being taken for confessed that the value for purposes of assessment of the various barges and boats for the various years mentioned in plaintiff's statement, are as set forth is said statement, except that the steamer Inverness, on September 15, 1901, was only worth $2500.00. It is therefore the judgement of the court that the defendant, the Ayer & Lord Tie Company be assessed as follows:

Upon the steamer Russel Lord, as of September 15, 1899, 1900 and 1901, at $13,000.00. Upon the steamer Pavonia, as of September 15, 1899, 1900 and 1901, at $3000.00. Upon the ste-mer Inverness, as of September 15, 1901 at $2500. Upon the barges owned by said company as of September 15, 1899, 1900 and 1901 at $10,000.00.

The defendant is further adjudged to pay the taxes due to the State of Kentucky, the county of McCracken and city of Paducah upon the foregoing assessment, together with a penalty of 20% of the total amount of said taxes due to Frank A. Lucas, rev-
83 enue agent.

The clerk of this court is hereby ordered and directed to certify the foregoing assessment to the auditor of public accounts for the State of Kentucky, and to the sheriff of McCracken county, for collection, and the defendant is adjudged to pay the costs of this action to all of which the defendant excepts.

The court in compliance with the request of the defendant files as part of this judgement its conclusions of fact, separately from its conclusions of law as follows, towit:—

Upon the hearing of this case, the court finds the facts to be:

Separation of Findings of Facts from Conclusions of Law.

1. That the defendant was at the time specified in the pleadings, the sole owner of the following described property, named in the petition towit: Steamers Russel Lord, Pavonia, Inverness and barges. That the same were of the value as follows: as set out in the statement. Russel Lord, $13,000 Pavonia, $10,000 00, Inverness, $2500.00, barges $10,000.00 that the defendant had enrolled said steamboats at Paducah, Kentucky, with the name "Paducah" painted on the stern of said vessels; that the defendant was a corporation legally incorporated under the laws of the State of Illi-
nois.

84 As a matter of law, the court adjudges that the port of Paducah, Kentucky, was at the times mentioned in the statement, the home port of said vessels and barges belonging to defendant, and named in the statement, and that all of said vessels were liable to assessment and valuation at the times stated in the statement, in McCracken county, Kentucky, for purposes of State, county and city taxes, for the years respectively. Russel Lord and Pavonia, 1899, 1900 and 1901. Inverness 1901, barges, 1899, 1900 and 1901. The defendant excepts to each of the above findings of facts and also to all of the conclusions of law."

The defendant, then on the same day filed written motion and moved the court to set aside the foregoing judgement and grant it a new trial herein, and in support of said motion filed reasons.

Exhibit "X," referred to above will be found coppied on page 44.

The following is the motion and reasons for a new trial referred to in the foregoing order, viz:—

Motion & Reasons for New Trial.

The defendant Ayer & Lord Tie Company comes and
85 moves the court to set aside the judgement herein and grant it a new trial, for the following reasons:—

1st. Because the judgement of the court is contrary to law.

2. Because the court erred in sustaining the demurrer filed by plaintiff to defendant's answer, to which defendant excepted at the time and still excepts.

3. Because the court erred in its conclusions of facts, to which defendant excepted at the time and still excepts.

4. Because the court erred in its conclusions of law, to which the defendant excepted at the time and still excepts.

AYER & LORD TIE COMPANY, Def't.
By CAMPBELL & CAMPBELL, Its Att's.

Afterwards towit:—at the extended April term of the above name- court, on the 7th day of June, 1904, the following was made herein, viz:—

86 This day came def't and produced to court bill of exceptions herein, which was signed by the judge of this court, and ordered to be filed and the same is now made a part of the record of this action.

The following is the bill of exceptions referred to in the foregoing order, viz:—

Bill of Exceptions.

Be it remembered that on the trial of this action and on motion of the defendant the court presented and filed the separate conclusions of facts and separate conclusions of law; to both conclusions of law and conclusions of fact, both the plaintiff and defendant excepted. Said conclusions of law and conclusions of fact are in words and figures as follows, towit:—

Upon the hearing of this case, the court finds the facts to be:

1. That the defendant was at the time specified in the pleadings, the sole owner of the following described property, named in the

87 petition towit: Ste-mers, Russel Lord, Pavonia, Inverness and barges. That the same were of the value as follows: as set out in the statement. Russel Lord, $13,000.00; Pavonia, $10,000.00; Inverness, $2500.00; barges $10,000.00; that the defendent had enrolled said steamboats at Paducah, Kentucky, with the name "Paducah" painted on the stern of said vessels; that the defendant was a corporation legally incorporated under the laws of the State of Illinois.

As a matter of law, the court adjudges that the port of Paducah, Kentucky was at the times mentioned in the statement, the home port of said vessels and barges belonging to defendant, and named in the statement, and that all of said vessels were liable to assessment and valuation at the times stated in the statement, in McCracken county, Kentucky, for purposes of State, county and city taxes, for the years respectively. Russel Lord and Pavonia, 1899, 1900 and 1901. Inverness, 1901, barges, 1899, 1900 and 1901. The

defendant excepts to each of the above findings of facts and also to all of the conclusions of law.

This bill of exceptions is true.

W. M. REED, Judge.

88 Afterwards to wit:—at the same term of the above named court, on the 8th day of June, 1904, the following order was made herein, viz:—

The def't's motion heretofore entered to set aside the judgement of the court rendered herein, and to grant it a new trial, is upon the court being advised overruled, to which ruling of the court, the def't objects and excepts and prays an appeal to the court of appeals which is granted.

Appeal Granted.

Afterwards to wit:—in vacation, on the 8th day of August 1904 the following agreement was filed in the clerk's office of the above named court, viz:—

It is agreed by the parties that the clerk of this court in preparing the record in this action for appeal, do insert and attach as part of the record the printed petition for re-hearing to the court of appeals in the above styled action, and filed in this court June 4, 1904.

August 8, 1904.

FRANK A. LUCAS, Rev. Ag't.
AYER & LORD TIE CO.,
By CAMPBELL & CAMPBELL.

9 Afterwards to wit:—in vacation, on the 24th day of August, 1904, the following supersedeas bond was executed in the clerk's office of the above named court, viz:

Supersedeas Bond.

YER & LORD TIE COMPANY, Appellant, *against* COM'TH OF KY., &c., Appellee.	Upon an Appeal Taken From a Judgement of the McCracken Circuit Court Rendered 4th day of June, 1904.

Whereas, said appellant has taken an appeal from the judgement the McCracken circuit court, rendered at its April term, 1904, against it in favor of the appellee, adjudging that the appellee's property be assessed for taxation as set out in said judgement and that said appellee pay the taxes thereon in accordance with said assessment & that said appellee pay to Frank A. Lucas, revenue ag't 20% the total amount of said taxes & that said assessment be certified to the State auditor & to the sheriff of McCracken county, Ky.,

for collection, and that appellee pay all costs of the action, and the appellant desires to supersede the whole of the said judgement above mentioned:—

Now we, Ayer & Lord Tie Company principal and J. W. McKnight surety, do hereby covenant to and with the appellee Com'th
90 of Ky., by Frank A. Lucas revenue agent for the State at large that the appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the whole of the judgement above stated; in case it shall be affirmed, and any judgement or order which the court of appeals may render, or ordered to be rendered by the inferior court, not exceeding in amount or value the whole of the judgement aforesaid.

Witness our hands, this 24th day of August, 1904.

AYER & LORD TIE CO.,
Per JAMES CAMPBELL, Att'y.
J. W. McKNIGHT.

Attest:
H. H. HOBSON, Clerk,
By W. C. KIDD, D. C.

The following is the supersedeas which issued on the foregoing bond, viz:—

Supersedeas.

STATE OF KENTUCKY:

Clerk's Office of the McCracken Circuit Court.

I do certify that an appeal has been granted from this court from a judgement obtained by Com'th of Ky., by Frank A. Lucas
91 revenue agent for the State at large against Ayer & Lord Tie Company rendered on the 4th day of June, 1904, in the McCracken circuit court, at its April term, 1904, and that a supersedeas bond has been executed. Therefore the appellees and all others are commanded to stay proceedings on the judgement above recited.

Given under my hand, as clerk of said court, this 24th day of August, 1904.

H. H. HOBSON, Clerk,
By W. C. KIDD, D. C.

The following is the sheriff's return on the foregoing supersedeas, viz:—

Sheriff's Return on Supersedeas.

Executed by delivering to Frank Lucas revenue agent a copy of the within supersedeas Aug. 26, 1904.

L. D. POTTER, S. M. C.,
By WM. LYDON, D. S.

Clerk's Certificate.

STATE OF KENTUCKY, }
County of McCracken, } *sct:*

92 I, E. W. Hobson, clerk of the McCracken circuit court, within and for the county and State aforesaid, do certify that the foregoing 17 typewritten pages and this page, together with the printed petition for re-hearing to the court of appeals, hereto attached, contains a full, true and complete transcript of the record of this action, since it came from the court of appeals, as the same appears of record and on file in my office.

Given under my hand, as clerk of said court, this 28th day of Sept., 1904.

E. W. HOBSON, Clerk,
By —— ——, D. C.

Cost of record $7.60.

With the foregoing transcript the appellant filed a statement in the office of the clerk of the court of appeals in words and figures following to wit:—

93 Statement.

The appellant files the following statement:
The following are the names of the parties to this appeal:
Ayer & Lord Tie Company, appellant.
The Com'th of Kentucky by Frank A. Lucas, appellee.
The judegment appealed from can be found on pages 11 and 12 of this record, and was rendered at the April (civil) term of the McCracken circuit court, on the 4th day of June, 1904.
November 30, 1904.

AYER & LORD TIE COMPANY, Appellant,
By CAMPBELL & CAMPBELL, Att'ys.

Be it remembered that on the 17th day of February in the court of appeals of Ky. at Frankfort the following order was entered to wit:

"AYER & LORD TIE COMPANY
vs.
COM'TH, by etc. } McCracken.

Came appellant by counsel and on motion this case is ordered advanced under rule 16 of this court and submitted, and it is ordered that the record in the former appeal of Com'th of Ky. by etc. vs. Ayer & Lord Tie Company, be placed with and considered on the present appeal.

94 And afterwards on the 22nd day of March 1905 at a court of appeals at the capitol at Frankfort the following judgement was entered to wit:

AYER & LORD TIE COMPANY, Appellant,
vs.
COMMONWEALTH OF KY., by FRANK A. Lucas, Revenue Agent, Appellee.
} Appeal from McCracken Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgement herein.

It is therefore considered that said judgement be affirmed which is ordered certified to said court.

It is further considered that the appellee recover of the appellant his cost herein expended.

And on said date the court delivered the following opinion.

Court of Appeals of Kentucky.

MARCH 22, 1905.

AYER & LORD TIE COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, by FRANK A. Lucas, Revenue Agent, Appellee.
} Appeal from the McCracken Circuit Court.

95 Opinion of the Court by Judge Paynter.

This case was before the court by a former appeal. The question involved on this appeal was decided on the former one. Commonwealth, by etc. *vs.* Ayer & Lord Tie Co. 25 R. 2061. Whether the conclusions of the court were correct or not, the opinion is the law of this case. Therefore, it is unnecessary to further discuss the question involves.

The judgement is affirmed.

96 Be it remembered that afterwards on the 25th day of April 1905 there was filed in the office of the clerk of this court an assignment of errors which — in words and figures as follows to wit:

97 Kentucky Court of Appeals.

AYER & LORD TIE COMPANY, Appellant and Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, by FRANK A. Lucas, Revenue Agent, Appellee and Defendant in Error.
} Assignment of Errors.

Appellant files herewith its petition for a writ of error, and says there are errors in the record and proceedings of the above case, and

for the purpose of having same reviewed in the Supreme Court of the United States makes the following assignment.

The court erred in its decision against the right of appellant to remove this cause to the circuit court of the United States, for the sixth circuit and western district of Kentucky.

The court erred in its decison that under and by virtue of section 4241 of Kentucky Statutes, the appellant was compelled to pay a tax on its steam-boats although engaged in interstate commerce, and the said decision and law are contrary to the Constitution of the United States, section eight of article one.

The court erred in its construction of the acts of Congress, sections 4141, 4178 and 4334, Revised Statutes, and the acts of Congress amending same, section 21, 23rd Statutes at Large, page 58 passed June 26, 1884, and erroneously under said statutes fixed situs of taxation of appellant's said property.

The court erred in rendering judgment against appellant.

The court erred in its first judgment in reversing the decision of the McCracken circuit court, and its second decision in affirming the judgment of said McCracken circuit court.

For which errors, Ayer & Lord Tie Company, the appellant, prays that the said judgments of the Kentucky court of appeals, rendered December 17, 1903, and March 22, 1905, be reversed, and a judgment rendered for the appellant, and for costs.

CAMPBELL & CAMPBELL,
Att'ys for Pl'ff in Error.

[Endorsed:] Filed Apr. 25, 1905. J. Morgan Chinn, C. C. A.

98 And afterwards *that* was filed in the office of the clerk of this court a petition for a writ of error from the United States Supreme Court to the court of appeals of the Commonwealth of Ky. and which petition is as follows:

99 Original.

Kentucky Court of Appeals.

AYER & LORD TIE COMPANY, Appellant, *vs.* COMMONWEALTH OF KENTUCKY by FRANK A. Lucas, Revenue Agent, Appellee.	Petition for Writ of Error.

Petition to the Chief Justice of the Court of Appeals of Kentucky for Writ of Error.

Because a manifest error hath happened in the rendition of a judgment against it by this court, as the highest court of law or equity in this State, in this cause wherein this court affirmed a

judgment of the McCracken circuit court rendered in this cause against it, according to the mandate and opinion of this court, wherein this court reversed a previous judgment of the said McCracken circuit court in this cause,—wherein was drawn in question the validity of a statute of the State of Kentucky imposing a tax on steam-boat owners using the Ohio river and its tributaries with their steam-boats for purpose of commerce between the States, and wherein was drawn in question the construction of an act of Congress in regard to the home port of vessels and the situs of taxation under said act, and wherein was drawn in question the right of removal of this cause to the circuit court of the United — for the sixth circuit for the western district of Kentucky. And all of said decisions being adverse to it, to the great damage of it, the said Ayer & Lord Tie Company and all of which appears in the record and proceedings in said suit.

Wherefore appellant prays for allowance of a writ of error, and such other process as may be necessary so that the said cause may be submitted to the Supreme Court of the United States.

Assignment of errors herewith.

CAMPBELL & CAMPBELL,
Attorneys for Appellant.

100 COMMONWEALTH OF KENTUCKY, Court of Appeals, } *ss*:

Let the writ of error issue upon the execution of a bond by Ayer & Lord Tie Company to the Commonwealth of Kentucky and Frank A. Lucas revenue agent, in the sum of $4000 *dollars*; said bond when approved to act as a supersedeas.

This 25 day of April 1905.

J. P. HOBSON,
Chief Justice of the Kentucky Court of Appeals.

The appellant is permitted to give bond in the sum of four thousand dollars ($4000.00) and ten days are given appellant to execute the bond.

Witness my hand as chief justice of the court — appeals of Kentucky this April 25 1905.

J. P. HOBSON.

[Endorsed:] Filed Apr. 25 1905 J. Morgan Chinn, C. C. A.

101 And afterwards on the 3rd day of May, 1905 there was filed in the office of the clerk of this court a writ of error and which is as follows:

102 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the court of appeals of the Commonwealth of Kentucky:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said court of appeals of Kentucky, before you on the 17th day of December, 1903 and also on the 22nd day of March of the January term, 1905, of your said court, between Ayer & Lord Tie Company, appellant, *versus* The Commonwealth of Kentucky by Frank A. Lucas, revenue agent, appellee a manifest error has happened, to the great damage of the said appellant, Ayer & Lord Tie Company, as by its complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C., and filed in the office of the clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3d day of May, 1905.

Done in the city of Frankfort, with the seal of the United
103 States circuit court for the eastern district of Kentucky.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
Clerk United States Circuit Court,
Eastern District of Kentucky,
Per E. H. COLEMAN, D. C.

Allowed
J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

103½ [Endorsed:] Filed May 3 1905 J. Morgan Chinn, C. C. A.

104 And afterwards on the 3rd day of May 1905, there was filed in the office of the clerk of this court a supersedeas bond, and which is as follows:

105 Supreme Court of the United States.

AYER & LORD TIE COMPANY, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, by FRANK A. LUCAS, Revenue Agent, Defendants in Error. } Bond.

Know all men by these presents, that we, Ayer & Lord Tie Company as principal and the United States Fidelity & Guaranty Co. of Baltimore Md., as surety, are held and firmly bound unto the Commonwealth of Kentucky and Frank A. Lucas revenue agent, in the sum of four thousand dollars ($4000.00) to be paid to the said Commonwealth of Kentucky, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 3rd day of May, 1905.

Whereas, the above name- plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgement rendered in the above entitled action by the Kentucky court of appeals.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

106

AYER & LORD TIE COMPANY,
By JAMES CAMPBELL, Att'y in Fact.
THE UNITED STATES FIDELITY & GUARANTY COMPANY.
JAMES H. POLSGROVE,
Att'y in Fact.

The above bond is approved.
J. P. HOBSON,
Chief Justice of the Kentucky Court of Appeals.

Know all men by these presents, that it, the Ayer & Lord Tie Company, of Chicago, Illinoes, does hereby make, constitute and appoint James Campbell, of Paducah, Kentucky, its true and lawful attorney for it and in its name and stead to sign, execute and deliver any all appeal bonds or undertakings required or necessary to appeal or sue out a writ of error from the Supreme Court of the United States to the court of appeal of the State of Kentucky, in the case lately decided in the last named court, entitled Ayer & Lord Tie Company, appellant, *vs.* Commonwealth of Kentucky, appellee, to do and perform all the necessary acts in the execution and prosecution of the aforesaid business, and in as full and able a manner as it might do if it were personally present.

107

In witness whereof, the said Ayer & Lors Tie Company has hereunto set its seal.

AYER & LORD TIE COMPANY,
By A. A. CARPENTER, JR., & P.

[CORPORATE SEAL.]

Attest:
PHILLIP R. SMITH.

STATE OF ILLINOIS, County of Cook, } ss:

On this 25th day of April A. D., 1905, before me personally appeared A. A. Carpenter Jr. vice president, and Phil. R. Smith secretary, to me known to be the vice president and secretary of the Ayer & Lord Tie Company, who acknowledged the execution of the foregoing power of attorney as such vice president and secretary for and as the act of the said company.

A. H. NAYES,
Notary Public.

[NOTARY PUBLIC.]

108 And afterwards on the 3d day of May / 1905 there was filed in the office of the clerk of this court an order allowing schedule, and which is as follows:

109 Court of Appeals of Kentucky.

AYER & LORD TIE CO., Appellant,
vs.
COMMONWEALTH OF KY., by, &c., Appellee. } Schedule.

The clerk of the court of appeals will copy the entire record and proceedings in the above case for the Supreme Court of the United States.

CAMPBELL & CAMPBELL,
Attorneys for Appellant.

[Endorsed:] Filed May 3 1905 J. Morgan Chinn, C. A.

110 And afterward on the 3rd day of May 1905, there was filed in the office of the clerk of this court an original citation and which is as follows:

111 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Kentucky and Frank A. Lucas, revenue agent of said Commonwealth, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the court of appeals of the Commonwealth of Kentucky wherein The Ayer & Lord Tie Company is plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the chief justice of the court of appeals of Kentucky, this 3d day of May 1905.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
J. MORGAN CHINN,
Clerk of the Court of Appeals of Kentucky.

I hereby accept service of this citation for the Commonwealth of Kentucky, in the case of Ayer & Lord Tie Company against The Commonwealth of Kentucky, by L., this May 3d 1905.

NAPOLEON B. HAYS,
Attorney General of Commonwealth of Ky.

I hereby accept service of this citation, this May 5, 1905.

FRANK A. LUCAS,
Revenue Agent, Com. of Ky.

111½ [Endorsed:] Ayer & Lord Tie Co. *vs.* Com'th of Ky. by &c. Citation.

112 COMMONWEALTH OF KENTUCKY, }
Court of Appeals. }

I, J. Morgan Chinn, clerk of the court of appeals of the Commonwealth of Kentucky, do hereby certify that the foregoing pages contain a full, true and complete copy of the transcripts of the records and proceedings had in the court of appeals of the Commonwealth of Kentucky, including the opinion of said court, in the action of

THE AYER & LORD TIE COMPANY, Appellant,
vs.
MMONWEALTH OF KENTUCKY, by FRANK A. LUCAS, Revenue Agent, Appellee,

full and complete as the same remain on file and of record in my ice, which transcript I herewith submit in pursuance of the com- and of the writ of error thereto attached. I also certify that the iginal assignment of errors, petition for writ of error, the original it of error, a copy of the writ of error bond, the order allowing the it of error, and approving the bond, and the original citation with oof of service thereof, and the schedule and a copy of the power of attorney from the Ayer & Lord Tie Company to James
3 Campbell, are hereto attached and herewith returned.

In testimony whereof, I have hereunto set my hand and ixed the seal of said court. Done at the capitol, at Frankfort, y., this the 3rd day of May 1905.

[Seal Court of Appeals, Kentucky.]

J. MORGAN CHINN,
Clerk of the Court of Appeals of the
Commonwealth of Kentucky.

Fee for this transcript $29.00.

W. G. BAXTER,
Official Copyist, Court of Appeals, Kentucky.

Endorsed on cover: File No. 19,769. Kentucky court of ap- eals. Term No. 268. Ayer & Lord Tie Company, plaintiff in ror, *vs.* The Commonwealth of Kentucky, by Frank A. Lucas, venue agent of said Commonwealth. Filed May 22d, 1905. File o. 19,769.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 10 1906
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1905.

No. 268

AYER & LORD TIE COMPANY,
Plaintiff in Error.

vs.

THE COMMONWEALTH OF KENTUCKY, BY FRANK A. LUCAS REVENUE AGENT OF SAID COMMONWEALTH,
Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES E. KREMER,
JAS. CAMPBELL,
Attorneys for Plaintiff in Error.

GEO. HORNSTEIN CO., PRINTERS, CHICAGO

2 51

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1905.

No. 268

AYER & LORD TIE COMPANY,
Plaintiff in Error.

vs.

THE COMMONWEALTH OF KENTUCKY, BY FRANK A. LUCAS REVENUE AGENT OF SAID COMMONWEALTH,
Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

This is an action under Sec. 4241 of the Statutes of Kentucky, instituted by Frank A. Lucas, revenue agent, on behalf of the Commonwealth of Kentucky in the County Court of McCracken County, against the Ayer & Lord Tie Company, alleging that the latter was, on the 15th day of September, in the years 1899, 1900 and 1901, the owner of the Steamer Russell Lord of the value of $13,000, and the Steamer Inverness of the value of $10,000, and the Steamer Pavonia of the value of $3,000, and that

each of the said steamboats was enrolled in accordance with the laws of the United States at the port of Paducah, Kentucky, in the county of McCracken, and that the words "Paducah, Kentucky" were painted on the stern of said steamboats, and that when not in use they were kept at Paducah, and that the port of Paducah was the home port of these steamboats.

It was further alleged that each of the said boats was used for the purpose of towing ties loaded on barges, and that the company was also the owner of certain barges used in connection with said steamboats for the purpose of transporting railroad ties and that on the 15th day of September, in the years 1899, 1900 and 1901, they were of the value of $10,000.

It is also alleged that the defendant failed and refused to assess any of the said steamboats or barges, and that no taxes on the same had been paid for the said years, and the plaintiff therefore prays that the company may be assessed for the taxes at the port named, and that the defendant be also adjudged to pay a penalty of 20 per cent. on the aggregate amount of taxes due and interest, and to pay the costs in the proceeding.

The Ayer & Lord Tie Company, as a corporation of Illinois, at the September term offered to file its petition for removal of the cause to the United States Circuit Court, on account of diversity of citizenship, the record showing the following entry (Record, 1):

> "This day came defendant and offered to file petition for removal of this action to the United States Circuit Court and also offered to file bond under Act of Congress with H. Baker and

James Campbell, sureties thereon, to all of which plaintiffs object, and this case is continued."

The record does not show what was done by the County Court further than this entry.

On Sept. 26th, 1902, the Ayer & Lord Tie Company filed an answer in the County Court which alleges in substance: That it is a corporation organized on the 5th day of August, 1893, under the laws of the State of Illinois, and was authorized and empowered to transact business with steamboats engaged in interstate commerce, and that it has ever since its incorporation been engaged in business as the owner of tow boats plying on the Mississippi, Ohio, Tennessee and Cumberland Rivers and their tributaries, in interstate commerce in transporting railroad ties from different points on said river to the port of Brookport, Illinois, and that the said tow boats occasionally touched at the port of Paducah, Kentucky, but never to take on or discharge their cargoes, but simply for the purpose of buying stores, employing seamen and for other like purposes, and that the steamboats and barges are in the State of Kentucky temporarily, most of the business being in transportation from different ports in Alabama, Mississippi, Kentucky, Missouri, Arkansas, Illinois and Tennessee, to the port of Brookport, Illinois, St. Louis, Missouri, and Duval's Bluff, Ark., and that at such ports the tow boats discharge and deliver their cargoes of ties. The Ayer & Lord Tie Company admits the ownership of the steamboats and barges during the years 1899, 1900 and 1901.

It further alleges that its main office is in the City of Chicago, Ill., and that it has offices also at Mound

City and Brookport, Ill., and at Paducah and Fulton, Ky., and also one at Duval's Bluff, Ark.

The company also claims the right under the Act of Congress and the Constitution of the United States, to trade at Paducah, Ky., Brookport, Mound City and at other ports, free from molestation or interference by the State of Kentucky, and that the state has no jurisdiction over the defendant's boats or to try and determine the cause.

The Ayer & Lord Tie Company denies that the home port of the steamers was at Paducah during the years 1899, 1900 and 1901, and denies that the State of Kentucky has the right to assess the property for taxes, and alleges that the property was taxable under the laws of the State of Illinois, where the owner resided, and that during the years 1899, 1900 and 1901, all of the said property was assessed by the defendant in the State of Illinois for taxation, and that it has paid taxes under the laws of the State of Illinois to the state, and to the City of Chicago on all of its said property, and that the said steamboats were for convenience sake, under the Act of Congress, enrolled or registered at the Port of Paducah by H. Baker, the general manager of the transportation department of the Ayer & Lord Tie Company.

To this answer Lucas, on Sept. 27th, 1902, entered and filed a demurrer and upon a hearing upon the statement, answer and demurrer, the latter was overruled and the case dismissed against the defendant in the County Court, whereupon Lucas took an appeal to the Circuit Court of McCracken County.

Here the renewal of the motion to transfer the case to the United States Circuit Court was made and denied, and thereupon a hearing was had upon the statement, answer and demurrer, and the latter

was again overruled and the case dismissed. Thereupon Lucas took an appeal to the Court of Appeals of Kentucky, where the decision of the Circuit and County Courts was reversed.

Thereupon the Ayer & Lord Tie Company filed a petition for a rehearing (Record, page 46), which was also overruled and the case remanded. A new trial was then had and the finding of the Circuit Court of McCracken County was substantially: That the Ayer & Lord Tie Company was the owner of the Steamer Russell Lord, of the value of $13,000, Pavonia of the value of $10,000, Inverness of the value of $2,500, and the barges of the value of $10,000. That these steamboats were enrolled at Paducah, Ky., and had the name "Paducah" painted on their sterns, and that the Ayer & Lord Tie Company was a corporation legally incorporated under the laws of the State of Illinois.

The court held as a matter of law that Paducah, Ky., was the home port of the vessels and barges, and that the vessels were liable to assessment at the valuation as stated above. A decree was entered and from this the Ayer & Lord Tie Company prayed an appeal to the Kentucky Court of Appeals, where the decision of the Circuit Court of McCracken County was affirmed, and thereupon a writ of error was sued out from this court.

The Ayer & Lord Tie Company assigns as error:

1st. That the court erred in not permitting it to remove the case to the Circuit Court of the United States for the Western District of Kentucky from the McCracken County Court.

2nd. That the court erred in compelling the Ayer & Lord Tie Company to pay a tax on its steamboats, although engaged in interstate commerce, and that

such a decision is contrary to Sec. 8, Art. 1, of the Constitution of the United States.

3rd. That the court erred in its construction of sections 4141, 4178 and 4334 of the Revised Statutes of the United States, and erroneously, under the statutes, fixed the situs of appellants' property for taxation at Paducah, Kentucky.

ARGUMENT.

It will be observed at the outset that there is no dispute as to the facts in this case. The allegations in the answer of the Ayer & Lord Tie Company are, by the demurrer, conceded to be true, and they are not necessarily in conflict with the allegations of the plaintiff's statement or declaration. The facts substantially are:

1st. That the Ayer & Lord Tie Company is and was an Illinois corporation with its main or home office at Chicago, Illinois.

2nd. That the Steamers Russell Lord, Pavonia and Inverness are steam vessels enrolled and licensed, and engaged in interstate commerce upon the waters of the Ohio, Mississippi, Tennessee and Cumberland rivers, and their tributaries.

3rd. That they are enrolled and licensed at Paducah, Ky., and have "Paducah" painted on their sterns.

4th. That they were kept at Paducah according to plaintiff's statement, when not in use, and according to the answer, they came there solely for the purpose of taking on board supplies and shipping crews, and never to take on or discharge cargoes.

5th. That the barges are engaged in interstate commerce, being towed by the steamers, *but that they are not enrolled and licensed, and have not "Paducah" painted on their sterns, and are not at Paducah when not in use or at any other time.*

It will be observed that we are speaking here of two kinds of craft, the enrolled steamboats and the unenrolled barges, and for the purpose of this case we will dispose of the barges first.

It appears from the statement that these barges are used in connection with the steamboats for the purpose of transporting railroad ties, and therefore like them engaged in interstate commerce. There is no allegation in the statement or in the answer that these barges were ever at Paducah, or in any other place in Kentucky. They therefore have no actual situs in Paducah or Kentucky, and not being enrolled and licensed, and not having their names painted on the stern, as is the case with the steamboats, they are in no sense in Kentucky or assessable there, and therefore they can have no other situs than that of their owner. They have no actual situs in Kentucky, because not in the state, and no artificial situs by virtue of an enrollment and license, and therefore are not in Kentucky at all and cannot therefore be assessed there. Whether they have an actual situs elsewhere, or whether their situs is that of the domicile of their owner, is entirely immaterial in this case. It is therefore perfectly apparent that under no aspect of the case can these barges be assessed in Kentucky.

The case of the barges here comes clearly within the case of the *Commonwealth* v. *American Dredge Co.*, 122 Pa., 386. In that case there were a number of barges and dredges which were located in no particular place, and therefore had no actual situs, and

it was a question as to whether they should be taxed at the home port or domicile of the corporation that owned them or not, and the Supreme Court of Pennsylvania says:

> "It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another state, it would be liable to taxation there. But the facts show that it is not permanently located out of the state. From the nature of the busines, it is in one place to-day and in another to-morrow, and, hence not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The rule as to vessels engaged in foreign or interstate commerce is that their situs for the purpose of taxation is their home port of registry, *or the residence of their owner, if unregistered. Pullman Palace Car Co.*, 29 Fed. Rep., 66; *Hays* v. *Pacific Mail Steamship Co.*, 17 How., 596. These vessels, if they may be so called, were not registered. Hence, their situs for taxation is the domicile of the owner. This rule must prevail in the absence of anything to show that they are so permanently located in another state as to be liable to taxation under the laws of that state."

These barges were exempt from enrollment or license under 21 Revised Statutes, p. 44. The statement does not allege that they ever were in Kentucky.

The answer alleges that they were engaged in interstate commerce between ports of different states.

Being unenrolled, they can only be taxed at the residence of the owner in Chicago, where their owner had them assessed and paid taxes on them.

As to so much of the decision of the Court of Appeals of Kentucky, there must be a reversal for it is indisputably erroneous.

II.

The gist of the decision of the Court of Appeals and its conclusion is, that as Paducah is the home port of the steamers in question, therefore that place is their situs for assessment and taxation.

The court does not find that Paducah is the actual situs of these vessels, but holds that Paducah is the home port of them because it is the place where they are enrolled and licensed, and because Paducah is painted on their sterns. This, their artificial situs, the court holds, is sufficient to subject the vessels to assessment and taxation there, regardless of the place of their ownership.

The court concedes that ordinarily the residence of the owner is the situs for taxation of personal property, but in this case the enrollment creates a different situs, and independent of the actual situs, holds it as a sufficient one. If, therefore, it should appear that these vessels were illegally enrolled and licensed at Paducah, and illegally had their names painted on the stern, then they had no legal situs at Paducah and it would follow that the Ayer & Lord Tie Company could only be assessed at Chicago, or at the place of the actual situs of the vessels, and therefore it was right in paying taxes upon these vessels at Chicago, the place of its domicile.

It is conceded that the steamers were subject to enrollment under the laws of the United States, and that section 4141 of the Revised Statutes applies to them, it being as follows:

> "Every vessel, except as hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be

> that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

Under this statute the Ayer & Lord Tie Company could only register or enroll their steamers at a port nearest to that in which it resided. Their steamers therefore should have been enrolled at Chicago, where it resided, that being a port and at the same time the place of residence of the corporation. These vessels could only be enrolled in compliance with sections 4313 and 4314 as follows:

> "Sec. 4313. Enrollments and licenses for vessels owned by any incorporated company may be issued in the name of the president or secretary of such company; and such enrollments or licenses shall not be vacated or affected by any sale of shares of stock in such company.
>
> "Sec. 4314. Previously to granting enrollment and license for any vessel, owned by any company, the president or secretary of such company shall swear to the ownership of such vessel, by such company, without designating the names of the persons composing such company, which oath shall be deemed sufficient, without requiring the oath of any other person interested or concerned in such vessel."

It follows, therefore, that no other officer or agent of the corporation had a right to procure an enrollment and license for these steamers except as provided in these sections. It nowhere appears that Mr. Baker, who, the answer says, enrolled these vessels, was either president or secretary of the Ayer & Lord Tie Company. He was designated general manager of the transportation department of the

company. This would not enable him to enroll them at Paducah.

These steamers should, therefore, have been enrolled and licensed in Chicago, and if, at the expiration of their licenses, they were found away from Chicago, should have been enrolled and licensed under section 4328, which is as follows:

> "Whenever it becomes necessary for the owner of any vessel of the United States navigating the western rivers or the waters on the northern, northeastern and northwestern frontiers of the United States otherwise than by sea, and being in a district other than that to which such vessel belongs, to procure her enrollment and license, or license, or renewal thereof, the same proceedings may be had in the district in which the vessel then is, as are required by law on application for such enrollment and license, or license, or renewal thereof, as the case may be, in the district to which such vessel belongs, excepting the giving of bond and the enrollment and issuance of license; and the officer before whom such proceeding is had shall certify the same to the collector of the district to which such vessel belongs, who shall thereupon, on the owner giving bond as required in other cases, duly enroll the vessel and issue license in the same form as if the application had originally been made in his office; and shall either deliver the license to the owner, or forward it by mail to the officer who certified to him the preliminary proceedings; and in the latter case, such officer shall deliver the license to the owner or master of the vessel."

It should be noticed that the same proceeding must be had in the district in which the vessel then is, or temporarily is, as is required by law on application for such enrollment and license, in the district to

which such vessel belongs, excepting the giving of a bond.

It will be noticed that such a foreign enrollment could not be obtained without the oath of either the secretary or president. It can not be done by an agent.

The present enrollment having been obtained by one who was not the secretary or president, it follows that the vessels were illegally and improperly enrolled at Paducah, and having been so illegally and improperly enrolled there, it follows that painting the name "Paducah" on their stern was also illegal and improper.

The question of ownership and place of enrollment are, under the law, separate and distinct from the matter of the painting of the name on the stern. Before the passage of the Act of 1884, the name to be painted on the stern was provided for by section 4334.

> "Every licensed vessel shall have her name and the port to which she belongs painted on her stern in the manner prescribed for registered vessels; and if any licensed vessel be found without such painting the owner thereof shall be liable to a penalty of $20."

The Act of 1884, Sec. 4178, provides that the word "port," as used in Sec. 4178 and Sec. 4334, in reference to painting the name and port of every registered or licensed vessel on the stern of said vessels, shall be construed to mean either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built, or where one or more of the owners reside.

This law, therefore, changed the requirement that the home port, which is always the residence of the

owner, or rather, the port nearest to the residence of the owner, should be painted on the stern.

It is difficult to reconcile this statute with the statute requiring the enrollment of a vessel at the port nearest to the residence of the owner. The statute is misleading if it is intended that in every case the name should indicate the home port of the vessel. It provides for at least two instances in which it might not be the home port of the vessel. It therefore has nothing to do with the means of giving a situs to the vessel. The port painted on her stern may be many hundred miles from the place at which she is enrolled, because it can be the place where she was built, or it may be the name of the place where she is enrolled, and be many hundred miles from the place where her owner resides. The name on the stern, therefore, is no evidence of the real home port of the vessel. It does not necessarily indicate where the residence of the owner is.

The home port is the one fixed by law to be the port nearest to the one at which the owner resides, and in this case that was Chicago, and this name should have been painted upon the stern of these steamers. The barges were not required to be and were, therefore, not enrolled and licensed, and therefore did not have any name painted on their sterns.

There could only have been a temporary enrollment of the steamers in this case at Paducah under Sec. 4323, which is as follows:

> "When any vessel shall be in any other district than the one to which she belongs, the collector of such district, on the application of the master thereof, and upon his taking an oath that, according to his best knowledge and belief, the property remains as expressed in the register or enrollment proposed to be given up,

> and upon his giving the bonds required for granting registers, shall make the exchange of an enrollment for a register or a register for an enrollment; but in every such case, the collector to whom the register or enrollment and license may be given shall transmit the same to the Register of the Treasury; and the register, or enrollment and license, granted in lieu thereof, shall, within ten days after the arrival of such vessel within the district to which she belongs, be delivered to the Collector of the District, and be by him canceled. If the master shall neglect to deliver the register or enrollment and license within such time, he shall be liable to a penalty of one hundred dollars."

Under this section, however, only the master was authorized to obtain the enrollment and he must surrender it when the vessel arrives at her home port.

These steamers were not so enrolled and were, therefore, illegally enrolled by one who had no right to do so under the law.

This case clearly comes within the rule in the case of *Morgan* v. *Parham*, 16 Wall., 471. In that case the Steamer Francis was the property of Morgan, who resided at New York, where the vessel had been registered, but at the time she was assessed for taxation in Alabama, she had been regularly enrolled as a coaster at Mobile and this license had been renewed for several years while the vessel had been employed in a daily line of steamers plying between Mobile and New Orleans, her master being a resident of Mobile, and the agent of the steamer also residing at Mobile. This court held in that case that the Francis had not become incorporated into the personal property of the state, but was there only temporarily and was engaged in lawful commerce between two states with her situs at the home port of

New York, where her owner resided was liable to be taxed upon her value.

The court adds that whether the Steamer Francis was actually taxed in New York during the years 1866 and 1867, does not apply to the case and is not important, as she is liable to taxation there and therefore New York alone had dominion over her for that purpose, adding:

> "Alabama had no more power to tax her or her owner than Louisiana or Florida, Georgia and South Carolina would have had in the case I have supposed."

The court's conclusion it seems to us, virtually covers the present case:

> "The jurisdiction of this court over the present case, as in the case of *Hays* v. *Steamship Co.* (*supra*) arises from the facts; first, that the property had not become blended with the business and commerce of Alabama, but remained legally of and as in New York; and second, that the vessel was lawfully engaged in the interstate trade, over the public waters. It is in law as if the vessel had never before or after that day been within the port of Mobile, but touching there on a single occasion when engaged in the interstate trade, had been subjected to a tax as personal property of that city. Within the authorities it is an interference with the commerce of the country not permitted to the states."

There is also the case of *St. Louis* v. *Wiggins Ferry Co.*, 11 Wall., 423. In that case the ferries, plying between St. Louis, Mo., and E. St. Louis, Ill., were enrolled and licensed in and hailed from St. Louis, Mo., and it was contended by the city authorities that they were taxable in St. Louis. This

court, however, held that though enrolled and licensed in St. Louis, and ostensibly having their home port there (because, like in this case, the place of enrollment was painted on the stern), they were taxable in Illinois, the residence of the owner. St. Louis in that case was one of the two terminal points of these ferries, and practically half of the time the ferries were in Missouri or in Missouri waters, and there was therefore a greater reason for taxing them at the place of their artificial situs than in the present case. Paducah was not a port to which the vessels went for cargo or at which these steamers and barges ended their voyages by delivering their cargoes. It was like any other place at which they might stop for fuel and supplies, or to ship additional members of their crew. It was a mere port of call.

The most recent case in this court upon the question of the taxation of vessels, is the case of *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S., 299. In that case the court held that certain steamers belonging to the Old Dominion Steamship Co., a Delaware corporation, could be taxed in Virginia because they plied exclusively between points and places in Virginia and practically spent all of their time in Virginia waters. They therefore acquired an actual situs in Virginia, and although they were registered and could have traded elsewhere the actual situs controlled.

The case of *Mayer et al., of Mobile*, v. *Baldwin*, 57 Ala., is in point. In that case a ferry boat plying between the City of Mobile and the eastern shore of Mobile Bay and in Alabama, was not taxable at the City of Mobile, although enrolled and licensed there, but was taxable at the residence of the owner.

which was on the eastern shore of Mobile Bay and not in the City of Mobile.

In the case of *Yost* v. *Lake Erie Trans. Co.*, 112 Fed. Rep., 746, the Court of Appeals for the 6th Circuit held that lake vessels owned by a Michigan corporation and enrolled in Michigan could not be taxed in Ohio where they were at least part of the time.

This case was decided by Judge Lurton and contains all of the citations of decided cases that have a bearing upon all the phases of the question of the taxation of vessel property engaged in interstate commerce.

Another test that can be applied in cases of this character, for the purpose of determining what the home port of a vessel is, are the class of cases that arise in the enforcement of liens for supplies and repairs furnished vessels at their home port. It is a familiar principle of maritime law that under the general maritime law there is no lien for supplies and repairs furnished a vessel in her home port, so when supplies and repairs have been furnished to a vessel in a port of the state to which she belongs or in which her owner resides, the lien, if any there be, is granted by the laws of such state.

The J. E. Rumbell, 148 U. S., 1.

It has been held in a number of cases that the home port of the vessel is not necessarily the port at which the vessel is enrolled and licensed, or the one that is painted on her stern in compliance with the United States statutes. The admiralty courts have invariably held that the residence of the owner determines the home port of the vessel, and not the

place of enrollment, or the place painted upon her stern.

The Lotus No. 2, 26 Fed. Rep., 637.

In this case the Steamer Lotus No. 2 was owned by a Mississippi corporation, with its place of business at Columbus, in that state. The vessel was enrolled in the Custom House at Mobile, Ala., and a mortgage on her executed by the owner was recorded there in accordance with the provisions of the United States statute. A number of creditors furnishing supplies to the steamer at Mobile claimed a lien in preference to that of the mortgagee. The latter, however, claimed that these supplies were furnished at the home port of the vessel (Mobile), the place of her enrollment, and therefore there was no lien under the maritime law and at most only a lien under the state law and the mortgage should, therefore, be preferred to the claims of the supplymen. Judge Bruce, however, held that notwithstanding the fact that the vessel was enrolled at Mobile under the United States statute, the home port nevertheless was Columbus, Miss., and therefore the claims for supplies were a lien under the maritime law, and not dependent upon the state law, and were therefore to be preferred to the mortgage.

In the case of the *Jenny B. Gilkey*, 19 Fed. Rep., 127, Judge Lowell says:

> "It has often been decided that the place of residence of the owners is to be considered the home port, even when the registration is in another state, if the facts of ownership were known or might have been known to the material men."

The same view is taken by Judge Brown of the Southern District of New York, in the case of the *Charlotte Vanderbilt*, 19 Fed. Rep., 219.

The Plymouth Rock, 14 Blatch., 505.
The Mary Chilton, 4 Fed. Rep., 457.
The E. A. Barnard, 2 Fed. Rep., 712.
The Golden Gate, Newb. Ad., 308.
The Martha Washington, 1st Cliff., 463.
The Thos. Fletcher, 24 Fed. Rep., 375.
The Chelmsford, 34 Fed. Rep., 399.
The Marion G. Harriss, 81 Fed. Rep., 964.
The Richard G. Garrett, 44 Fed. Rep., 379.

In the case of *The Havana*, 64 Fed. Rep., 496, the Court of Appeals, 2d Circuit, held that supplies furnished in New York to a steamer enrolled in New York, when owned by a New Jersey corporation, were entitled to a lien under the maritime law, and that her home port was not New York where she was enrolled.

In the light of these authorities it cannot be said that the home port of these vessels was Paducah. Had supplies been furnished them at Paducah and a conflict had arisen as to whether there should be a lien for such supplies under the laws of Kentucky, or under the maritime law, an admiralty court would have decided that the home port of these vessels was in Illinois, and that the supplies furnished at Paducah were entitled to a lien under the maritime law.

Under these decisions coming down to us for more than fifty years, determining, as they do, what the home port of an enrolled and licensed vessel is, it would be an anomaly for the court now to hold that in one class of cases the residence of the owner determines where the home port is, and in

another class of cases the home port is determined by the place of enrollment. Leaving out the question of whether the boats were legally or illegally enrolled in any place, the safer rule is one which fixes the residence of the owner as the home port of the vessel, rather than the one at which she may be enrolled and licensed.

Under the present law one of three different localities may be represented by the name on the stern of the steamer, and this therefore furnishes no reliable guide either as to her place of enrollment or her ownership. At every place of enrollment the ownership can be ascertained, and at the same time the residence of the owner, and therefore the home port can always be determined by an examination of the enrollment. The home port of these vessels was Chicago, where their owner resided, and not at Paducah, where they were enrolled.

The right to assess these vessels for taxation is based upon their enrollment at Paducah. The burden of showing this is upon the state or officer of the state who seeks to subject them to assessment. The state must therefore show where the home port is. If the home port is not in Kentucky, then they cannot be assessed there. The validity of the enrollment must appear if relied upon. If the enrollment is invalid or illegal, these vessels had no situs whatever in Kentucky.

The plaintiff is not estopped from claiming an invalid enrollment against the State of Kentucky because the state is in no way a party to such enrollment. This is a proceeding entirely between the Government of the United States and the Ayer & Lord Tie Co., which does not inure to the benefit or advantage of the state. The latter is a mere outsider, in no way interested in the matter of enroll-

ment, and therefore cannot invoke the rule of estoppel.

The State of Kentucky was in no way benefited by relying upon a legal enrollment. It cannot therefore be injured by the enrollment being held illegal.

It was at all times a stranger to the transaction.

The state must show a situs of the property in question.

Walker v. *Walker*, 9 Wallace, 755.
Marine N. Bk. v. *Fiske*, 71 N. Y., 353.
Myers v. *Cronk*, 113 N. Y., 608.
Monson v. *Tripp*, 81 Maine, 24.

In this case the steamboats had no actual situs. They were engaged in interstate commerce. They belonged to no one place. They were no part of the property in Kentucky. They were engaged in trading between places in different states upon different waters, and the court is called upon now to determine whether the artificial situs of these vessels, or the place of their ownership is to control the question of where they should be assessed and taxed.

We have been unable to find a single decided case in which the situs for taxation has been determined by the place of enrollment when the domicile of the owner was at a different place, and the vessels had no actual situs by lying or plying in one state or locality.

If such were to be permitted it would open the way for enrollment in places where the tax might be lower as against the place where the owner resided. In this case if taxes were lower at Paducah than at Chicago it would be more to the interest of the Ayer & Lord Tie Company to have its vessels enrolled at Paducah and pay taxes there rather than at Chicago. If, however, the place of enrollment is not to deter-

mine the place where the vessels may be assessed and taxed, then there is no opportunity for dodging the payment of the taxes, and the place is fixed in harmony with the well settled rules relating to personal property employed in interstate commerce.

In conclusion, the barges not being enrolled and having no actual or artificial situs in Kentucky, could not be assessed there.

The steamers, being illegally enrolled at Paducah, had not even an artificial situs there. Paducah was not their home port. The home port was Chicago, Illinois, and the Ayer & Lord Tie Company could only be assessed and taxed there for both steamers and barges.

It paid its taxes at Chicago as it should.

Respectfully submitted.

CHARLES E. KREMER,
JAS. CAMPBELL,
Attorneys for Plaintiff in Error.

Chicago, March, 1906.

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Supreme Court of the United States

OCTOBER TERM, 1905.

NO. 268

AYER & LORD TIE COMPANY, Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, BY FRANK A. LUCAS, REVENUE AGENT OF SAID COMMONWEALTH, Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Brief for Defendant in Error.

N. B. HAYS, Attorney General,
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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Brief for Defendant in Error.

On September 8th, 1902, Frank A. Lucas, revenue agent of Kentucky, filed a statement in the McCracken County Court to require the plaintiff in error to list certain property for taxation, which it had theretofore failed to do. This property consisted of certain-named steamboats and barges. These steamboats and barges *had duly painted on their sterns*, as required under the laws of the United States governing navigation, the words, "*Paducah, Kentucky*," which city is the county seat of McCracken

county, Kentucky. The boats and barges referred to were used to transport railroad ties on the Mississippi, Ohio, Tennessee and Cumberland rivers, adjacent to Paducah, Kentucky; and when said boats and barges were not in use they were kept at the port of Paducah. The value of said boats was given, and such allegations were made as were necessary to subject said property to taxation. (R., 3.)

The plaintiff in error filed its petition in said Court for the removal of said proceeding to the United States Circuit Court for the Sixth Circuit and Western District of Kentucky, which transfer was denied by the State Court. (R., 5.)

It then filed an answer in which it made an issue with the State, as to Paducah, Kentucky, being the "home port" of the vessels, and the right of the State to compel plaintiff in error to pay State taxes; and as to the value of a part of said property, but the value fixed by the plaintiff in error is the same as fixed in the assessment thereafter made. (R., 7.)

The State demurred to the answer filed in the county court, and the Court, after having considered it, overruled said demurrer, to which ruling the State excepted, and declining to plead further, the Court dismissed the statement filed by the State's agent, to which ruling the State excepted and appealed to the McCracken Circuit Court. (R., 10.)

On February 5, 1903, the appeal was heard in the McCracken Circuit Court, and this Court overruled the motion to approve the bond and transfer the case to the United States Circuit Court for the Western District of Kentucky, and denied the petition for removal, to which ruling the plaintiff in error excepted.

The Court then overruled the demurrer of the State to the answer of the plaintiff in error, to which ruling the State excepted, and declined to plead further, whereupon the Court dismissed the statement filed by the State's agent, to which ruling the State excepted and prayed an appeal to the Court of Appeals of Kentucky. (R., 11.)

On December 17, 1903, the Court of Appeals of Kentucky reversed the judgment of the McCracken Circuit Court, and remanded the case in an opinion, affirming the judgment of the McCracken Circuit Court in overruling the motion to approve the bond offered and to transfer the case to the United States Circuit Court for the Western District of Kentucky; and reversing said judgment as to the order of the Court in overruling the State's demurrer to the answer of the plaintiff in error, and held that Paducah was the "home port" of said boats and barges, and the actual situs of said property, and they were subject to taxation in said State, county and city. (R., 15.)

Plaintiff in error then filed its petition for a rehearing in the Court of Appeals of Kentucky. (R., 20.)

Said Court overruled the petition for a rehearing in a response filed March 18, 1904. (R., 30.)

On June 4, 1904, the mandate and opinion of the Court of Appeals of Kentucky were filed in the McCracken Circuit Court, and its former judgment vacated and set aside; said Court thereupon rendered judgment in conformity with said opinion and mandate. (R., 31-2-3-4.)

From this judgment plaintiff in error duly prosecuted an appeal to the Kentucky Court of Appeals, which was affirmed by said Court on March 22, 1905. (R., 40.)

This judgment is now before this Honorable Court for review, on a writ of error to the Court of Appeals of Kentucky.

FIRST QUESTION.

This action is not such as may be originally brought in the United States Circuit Court, and does not come within the provisions of the act of Congress providing for the removal of actions from the State to the Federal courts. The Commonwealth of Kentucky is the real party plaintiff, and is not a citizen within the meaning of said act of Congress providing for removal on the allegation of diverse citizenship.

Postal Tel. & Cable Co. v. Alabama, 155 U. S., 821 (39 : 231).

Fitz v. McGhee, 172 U. S., 518 (43 : 537).

Stone v. South Carolina, 117 U. S., 430 (29 : 430).

In re Ayres, 123 U. S., 443 (31 : 26).

Ferguson v. Ross, 38 Fed., Rep., 161.

C., St. L. & C. R. R. Co. v. Commonwealth, 24 R., 2124.

SECOND QUESTION.

That the owners of boats and barges may be required to pay taxes thereon according to their value, somewhere, we think, is well settled. If the actual *situs* and home port of the boats in question is Paducah, Kentucky, under the laws of the United States governing navigation, then these boats and barges are within the jurisdiction of the State of Kentucky, and the county of McCracken; are protected by the State's laws, and subject to State and county taxation; and if the tax is levied only at the home port, and said boats and barges are valued as other property, and without unfavorable discrimination, because of their employment, it is a valid power of the State. The *situs* of said boats for the purposes of taxation, is Paducah, Kentucky; and being a part of the property of

this State, and said county, they are subject to taxation there, and not elsewhere.

Hays v. Pacific Mail Steamship Co., 58 U. S., 596 (15 : 254).

Transportation Co. v. Wheeling, 99 U. S., 273 (25 : 412).

St. Louis v. Ferry Co., 78 U. S., 432 (20 : 192).

Pullman Pal. Car Co. v. Penn., 114 U. S., 36 (35 : 616).

Moran v. New Orleans, 112 U. S., 75 (28 : 653).

Morgan v. Parham, 83 U. S., 471 (21 : 304).

In Hays v. Pacific Mail Steamship Co., 58 U. S., 596 (15 : 254), the Court said:

> "These provisions, and others that might be referred to, very clearly indicate that the domicile of a vessel that requires to be registered, if we may so speak, or *home port*, is the port at which she is registered, and which must be the nearest to the place where the owner or owners reside. In this case, therefore, the home port of the vessels of the plaintiffs was the port of New York, where they were duly registered, and where all the individual owners are resident, and where is also the principal place of business of the company; and where, it is admitted, the capital invested is subject to State, county and other local taxes. * * *
>
> "The distinction between a vessel in her home port and when lying in a foreign one, or in the port of another State, is familiar in the admiralty law. She is subjected, in many cases, to the application of a different set of principles." *7 Pet.*, 324; 4 *Wheat* 438.
>
> "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other

personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

In Transportation Co. v. City of Wheeling, 99 U. S., 273 (25 : 412), the Court said:

"Annual taxes upon ships and vessels for the support of the State government as property, upon a valuation as other personal property, are everywhere laid; nor is it believed that it requires much argument to prove that the opposite theory is unsound and indefensible in principle, as it is contrary to the generally received opinion, and wholly unsupported by any judicial determination. Instead of that, there are many cases in which the courts in refuting the authority of the States to lay duties of tonnage, have admitted that the owners of ships may be taxed to the extent of their interests in the same, for the value of the property. Assessments of the kind, when levied for municipal purposes, must be made against the owner of the property, and can only be made in the municipality where the owner resides."

In Moran v. New Orleans, 112 U. S., 75 (28 : 653), the Court said:

"And it is undoubtedly true, as it has often been judicially declared, that vessels engaged in foreign or interstate commerce, and duly enrolled and licensed under the acts of Congress, *may be taxed by State authority as property;* provided the tax be not a tonnage duty, *is levied only at the port of registry, and is valued as other property in the State, without unfavorable discrimination* on account of its employment."

In Morgan v. Parham, 83 U. S., 471 (21 : 304), the Court said:

"Ships or vessels are required to be registered by the collector of the district in which shall be comprehended the port to which the same shall belong at the time of the registry, which port shall be deemed to be that at, or nearest to, which the owner, if there be but one, or, if more than one, the husband and acting manager usually resides. (1 Stat. at L., 288.) *Permanent registry*, therefore, as appears by this provision, *is required to be made at the home port of the vessel*, and what is meant by the home port is clearly and plainly defined. Registry must be made at her home port, and the same section provides that the name of the vessel, and the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters of not less than three inches in length. All persons, therefore, have the means of ascertaining the name of the vessel and her home port; and her shipping papers, which include a copy of her register or enrollment, are by law required to furnish the same information. The act of February 18th, 1793, prescribes the terms and shows the effect of an enrollment in another port. In substance, the permanent register is given up to the collector of that port, and a certificate is issued showing the name of the vessel, the port to which she belongs, and that to which she is destined. This certificate is temporary in its character, and is based on the proposition that the vessel belongs, or has her home port, at a different place from that at which she receives this certificate. (Blanchard v. The Martha Washington, 1 Clif., 466; Bk. v. Smith, 74 U. S., XIX, 211.) There was nothing, therefore, in her enrollment in the Port of Mobile that effected her registry in New York, or her ownership in that place, or that tended to subject her to the taxation of the State of Alabama, under the circumstances stated.

"It is the opinion of the Court that the State of

> Alabama had no jurisdiction over the vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily, only, and that it was engaged in lawful commerce between the States, with its *situs* at the home port of New York, where it belonged and where its owner was liable to be taxed for its value."

In Pullman Palace Car Company v. Commonwealth of Pennsylvania, 141 U. S., 18 (35 : 616), the Court said:

> "Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States at the domicile of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporally touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual *situs* within its jurisdiction, and, therefore, can be taxed only at their legal *situs*, their home port and the domicile of their owners."

"HOME PORT."

The "home port" of boats and vessels engaged in interstate commerce and plying along our navigable rivers, has been fixed by acts of Congress. This gives such boats and vessels a legal situs, which is necessary for the protection of both the owners and the public, as well as to fix the reciprocal relations and duties of the State and the owners as to protection and taxation.

United States Compiled Statutes, 1901, section 4131,

defines what are vessels of the United States, and section 4311 declares that when such vessels are registered or enrolled as therein provided they are vessels of the United States, and by sections 4141, 4178 and 4334, and the act of Congress of June 26, 1884 (U. S. Compiled Statutes, Vol. 3, page 2831), the methods and manner of registry and enrollment are prescribed. Said statutes will be found in the Appendix to this brief.

Under these several acts of Congress such boats and vessels are required to have an legal situs, which is termed their "home port." This requirement is for the benefit alike, of the public and the owners of such boats and vessels. The owner or owners of such boats and vessels, under the act of Congress of June 26, 1884, and section 4178, U. S. Com. Stat. (1901), are required to mark upon the stern of each vessel its "home port." They may select as such home port "the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built, or where one or more of the owners reside;" but when the election has been made, as in this case, its artificial situs becomes for the purpose of taxation, and the owner's right of exemption from taxation elsewhere, its *actual and legal situs;* and when such election has been made, it is subject to taxation at its home port.

Although assessed and taxed in Illinois, the same property is not exempt from taxation in Kentucky.

Plaintiff in error says in its answer (R., 9) that said boats and barges were, during the years of 1899, 1900 and 1901, taxed by the State of Illinois, and, therefore, are

not subject to taxation in Kentucky. Said allegation reads:

> "It says that all of said property during these years was assessed by defendant in the State of Illinois for taxation, and has been taxed and defendant has paid taxes under the statute of Illinois, to said State and city of Chicago, on all of said property, and denies the right of the State of Kentucky to subject same property to taxation."

This is the same contention that was made in this Court in the case of Coe v. Errol, 116 U. S., 517 (29 : 715), wherein the Court said:

> "If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least effect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary. The fact, therefore, that the owners of the logs in question were taxed for their value in Maine, as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case and may be laid out of view."

ACTUAL SITUS.

Inasmuch as the plaintiff in error is a corporation created and existing under the laws of Illinois, it is a citizen of said State, and its principal office being in the city of Chicago, these boats and vessels can not, therefore, have a home port in Chicago, nor an actual *situs* in said city and State. It follows that their home port and actual *situs*, although different from the domicile of the

owner thereof, must determine their legal *situs;* and their home port being in McCracken county, Kentucky, and the city of Paducah and being constantly employed and used in the streams of Kentucky, and those adjacent thereto, and when not in use kept at Paducah, they are property within the jurisdiction of said city, county and State, for the purpose of taxation, and the right of the State to tax them should not be denied.

Pullman Palace Car Co. v. Penn., 141 U. S., 36 (35 : 613).

American Refrigerator Trans. Co. v. Hall, 171 U. S., 68 (43 : 899).

Old Dominion Steamship Co. v. Virginia, 198 U. S., 302 (49 : 1059).

Northwestern Lumber Co. v. Chehalis County, 87 Am. St. Rep., 747.

National Dredging Co. v. State, 99 Ala., 462.

Norfolk and Western R. R. Co. v. Board of Pub. Works, 97 Va., 23.

Minburn v. Hays, 56 Am. Dec., 366.

Union Trust Co. v. Kentucky, 199 U. S., 194 (October term, 1905).

In Pullman Car Co. v. Penn. (supra), on page 617, the Court said:

> "The State having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction without regard to the place of the owner's domicile, could tax the specific cars, which at a given moment were within its borders." * * *
>
> (Page 618.) "For purposes of taxation, as well as for other purposes, *that situs may be fixed in whatever locality the property may be brought and*

used by its owners, by the law of the place where it is found."

In American Refrigerator Company v. Hall (supra) the Court held (904):

> "It having been settled, as we have seen, that where a corporation of one State brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in a like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed."

In Old Dominion Steamship Company v. Virginia (supra) the question presented was whether or not the plaintiff in error, which was a corporation created under the laws of Delaware and a non-resident of Virginia, and all of whose vessels and boats were regularly enrolled and registered under the laws of the United States, outside of the State of Virginia, with the name and the port of said vessels painted on the stern of each of them, was liable for taxes on its boats and vessels used in the navigable waters within the State of Virginia, and the Court held, on page 1062:

> "A State can not regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property used by its citizens.

* * * That the service in which these vessels were engaged formed one link in a line of continuous interstate commerce may affect the State's power of regulation, *but not its power of taxation.* True, they were not engaged in an independent service, as the cabs in *New York ex rel. Penn. R. R. Co. v. Knight*, 192 U. S., 21 (48 : 325), but being wholly within the State, that was *their actual situs.* And, as appears from the authorities referred to, the fact that they were engaged in interstate commerce does not impair the State's authority to impose taxes upon them as property. Indeed it is not contended that these vessels, although engaged in interstate commerce, are not subject to State taxation, the contention being that they are taxable only at the *port at which they are enrolled.* In support of this contention the two principal cases relied upon are *Hans v. Pacific Mail S. S., Co.*, 17 Howard 596, and *Morgan v. Parham*, 16 Wall., 471 (21 L. ed. 303)." * * *

Then after quoting the sections of the Statutes which require, and set out the manner of registry and enrollment, and stating the objects of registry, the Court continues:

"This object (registry) does not require, and there is no suggestion in the Statutes, that vessels registered or enrolled are exempt from the ordinary rules respecting taxation of personal property. *It is true that by Section* 4141 *there is created what may be called the home port of the vessel, an artificial situs, which may control the place of taxation, in the absence of an actual situs elsewhere*, and to that extent only do the two cases referred to go. * * * Of course, if the enrollment does not exempt vessels from taxation, as other personal property, the place of enrollment whether within or without the State in which the property is actually situated, is immaterial, for other like property is taxable at its actual situs.

"So far as the State authorities are concerned, reference may be made to *Lott v. Mobile Trade Co.* 43 Ala. 578; *National Dredging Co. v. State*, 99 Ala. 462; *Northwestern Lumber Company v. Chehalis County*, 25 Wash. 95, 87 Am. St. Rep., 747.

"*Our conclusion is that where vessels, though engaged in interstate commerce, are employed in such commerce wholly within the limits of a State, they are subject to taxation in that State, although they may have been registered or enrolled at a port outside its limits.*"

In the Northwestern Lumber Co. v. Chehalis County, 87 Am. St. Rep., 747, and which is quoted approvingly in the last above named case (Old Dominion Steamship Co. v. Virginia), it appears that the Company was a corporation organized under the laws of California; that the three tugs "Astoria," "Traveler" and "Printer," all ocean going tugs, were registered at the port of San Francisco, in the State of California, and were assessed and paid taxes in the State of California; that they were engaged in business, plying the waters in the State of Washington, and that the resident manager of the corporation resided at Hoquiam, in Chehalis county, Washington, where they were sought to be taxed by the State and county. The controversy arose over the assessment of the three tugs, and in passing on the validity of the same the Court held:

"Sound reasons exist for the right of the State to tax these vessels that are permanently here transacting local business. They receive the protection of the local government, and if mere registry in another port is conclusive against the right to tax here, a boat can operate in our local waters, confined entirely to local business, and, if owned elsewhere, may evade all taxation in this State. Such construction should not be adopted unless imperatively de-

manded by superior authority. Under the revenue law of this State personal property is taxed at its situs, and without reference to the residence of the owner. We have examined the evidence in this record upon the exception made to the findings of the superior court and fully coincide with the findings. The evidence discloses that for from four to seven years the three tugs have been at Hoquiam, in Chehalis county; that their business has been towing in the waters of Gray's and Willapa harbors in this State; that the corporation plaintiff, for some fifteen years last past, has owned and operated large saw mills, owns large areas of timber lands, and has manufactured from twenty to thirty million feet of lumber annually; that these tugs tow vessels usually from Hoquiam through the harbor to the ocean; that all contracts of towage are made by the captains of the respective tugs, who reside at Hoquiam; that the crews reside there; that the assistant secretary and manager of the company resides there; that all accounts are rendered to him there; that the captain and crews are paid there, and the only absence of the tugs from these harbors shown by the record have been for the purpose of repairs. They appear to have been used for all these years as appurtenant to, and a part of, the lumbering plant and business of the plaintiff in Chehalis county, and upon these facts, we conclude that the situs in fact of the three tugs is in Chehalis county, and that there was a valid assessment levied on their value."

In National Dredging Company v. State, 99 Ala., 462, the Court there held:

> "That in determining the liability of personal property to taxation, *its actual situs*, and not the domicile of the owner, is the material inquiry; and if personal property is brought into this State for the purpose of carrying on certain work, and its business here is not merely transitory, but for an in-

> definite period, it becomes incorporated with the property in this State for revenue purposes, and is taxable here notwithstanding the domicile of the owner in another State. * * * A tug boat, although sea going, propelled by steam, and registered at the port of its owner's domicile in another State, is taxable in this State, when its business is wholly in Alabama, and it is to remain here for an indefinite time."

In Norfolk & Western R. R. Co. v. Board of Public Works, 97 Va., 23, the tugs and barges sought to be taxed were enrolled and registered in the city of Philadelphia, but plied along the navigable streams in Virginia, between Lambert's Point and Norfolk, and in passing on the question of taxation, the Court said:

> "That these tugs and barges are engaged in interstate commerce does not exempt them from taxation; nor does the place of their enrollment or registration fix their situs for taxation, though it is a circumstance to be considered in its determination. The facts in our judgment clearly show that the property in question is owned, and may be lawfully taxed in this State."

In Union Refrigerator Transit Company v. Kentucky, 199 U. S., 194 (Decided November 13, 1905), the Court held:

> "The power of taxation is exercised upon the assumption of an equivalent rendered in the protection of the property and person of the taxpayer, and if such equivalent can not possibly be rendered because the property taxed is wholly beyond the jurisdiction of the taxing power, the taxation thereof within the domicile of the owner amounts to a taking of prop- only without due process of law.
>
> "While there may be individual cases where the

weight of the tax necessarily falls unequally on account of special circumstances the general rule is that in classifying property for taxation, some benefit to the property taxed is a controlling consideration, and a plain abuse of the power in this respect may justify judicial interference.

"The proper use of a legal fiction is to prevent injustice and the maxim *mobilia sequuntur personam* may only be resorted to when convenience and justice so require. That doctrine does not apply to tangible personal property permanently located in another State where it is employed and protected, acquires a *situs* and is subject to be there taxed irrespective of the domicile of the owner; and an attempt on the part of the State in which the owner is domiciled to tax such property amounts to a deprivation of property without due process of law within the purview of the Fourteenth Amendment."

It thus appears that the actual situs and the home port of the steamers and barges in question was and is Paducah, McCracken county, Kentucky; that they are permanently employed along the navigable rivers adjacent thereto, and as said by the Kentucky Court of Appeals. (Record, pages 18 and 19):

"The steamboats involved in this litigation are separated from the residence of their owner by a long distance, in fact they can never visit the port at which their owner resides; they are, so far as their actual situs is concerned, permanently confined to the rivers over which they float; if their home port had to be Chicago, because that is the residence of their owner, as under the law prior to 1884, then they would have a home port from which they could derive no advantage or protection, because they could never reach it. It was to obviate this hardship, with others, that the act of 1884 was passed by Congress, permitting their owners to select for them

a home port in the field of their operations, which is for them a home port in fact, as well as in law and name. Property, such as that under consideration, ought, logically, to be taxed at its own home port; there it can be seen and property valued for assessment by the fiscal officers; whereas, at the residence of its owner, (Chicago) the officers, of necessity, must rely on the statements of the owner for both the existence of the property and its value. At its home port it enjoys the protection of the laws of the jurisdiction in which it is located, and both justice and reason would seem to require that property thus permanently located, both in legal contemplation and in fact, within a jarisdiction foreign to that of its owner, should contribute its fair share to the support of that government whose protection it enjoys."

Hence when there is a difference between the home port and the permanent actual situs, of such boats and vessels, the actual situs will fix the place of taxation of such vessels; but when the actual situs, as in the case at bar, is in part the same as the home port of such vessels, then the home port will determine the place of taxation.

We ask that the judgment of the State Court be affirmed.

N. B. HAYS,
Attorney General,
CHAS. H. MORRIS,
For Defendant in Error.

APPENDIX.

Acts of the General Assembly (1900), Chapter 10, Page 39.

AN ACT to amend an act, entitled "An act to regulate the assessment of property for taxation and the payment thereon, belonging to non-residents of the counties in which the same is situated," approved March 19, 1894.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That an act, entitled "An act to regulate and insure the assessment of property for taxation and payment of taxes thereon belonging to non-residents of the counties in which the same is situated," approved March 19, 1894, be, and the same is, amended as follows, and re-enacted as amended: That section first of said act be amended to read as follows:

"§ 1. That it shall be the duty of all persons owning any real or personal property in this State, other than in the county in which the said owners reside, or if they should reside out of the State, to list the property for taxation, personally, or by an authorized agent, in the county where situated, at the same time and in the same manner as is now required by law of resident owners; or to file a description list of the same between the fifteenth day of September and the fifteenth day of October in each year, with the county clerk of the county where said prop-

erty is located, fixing a fair cash value of the same, and giving the nearest resident thereto, and the number of the magisterial district in which the same is located. Whoever shall willfully fail or refuse to comply with the provisions of this act shall be fined not exceeding fifty dollars, to be recovered by an indictment in the county in which the same is situated: *Provided*, That no fine shall be assessed when the property is assessed and taxes paid by the owner or his agent."

§ 2. That all actions and prosecutions now pending, in which judgment of conviction has not been rendered, shall proceed under the provisions of this act.

Approved March 17, 1900.

Kentucky Statutes, Sections 4039 and 4241.

"§ 4039. That it shall be the duty of all persons owning any real or personal property, mineral rights or standing (branded) trees of any kind whatever, on the lands of another, or any coal, oil or gas privileges, by lease or otherwise, or any interest therein, in this State, other than in the county in which the said owners reside; or if they should reside out of the State, to list the property for taxation, personally or by an authorized agent, in the county where situated, at the same time and in the same manner as is now required by law of resident owners; or to file a descriptive list of the same between the fifteenth day of September and the fifteenth day of October, in each year, with the county court clerk of the county where said property is located, fixing a fair cash value of the same, and giving the nearest resident thereto, and the number of the magisterial district in which the same is located. Whoever shall willfully fail

r refuse to comply with the provisions of this act shall e fined not exceeding fifty dollars, to be recovered by an ndictment in the county in which the same is situated: *Provided*, That no fine shall be assessed when the property is assessed and the taxes paid by the owner or his gent. That all actions and prosecutions now pending n which judgment of conviction has not been rendered hall proceed under the provisions of this act."

"§ 4241. It shall be the duty of the Sheriff or Auditor's gent to cause to be listed for taxation all property omitted, or any portion of property omitted, by the assessor, oard of supervisors, board of valuation and assessment or railroad commission, for any year or years. The officer proposing to have such property assessed shall file in the clerk's office of the county in which the property may be liable to assessment, a statement containing a description and value of the property proposed to be assessed, and the value of corporate franchise, if any, and the name and place of residence of the owner, his agent or attorney, or person in possession of the property, and the year or years for which the property is proposed to be assessed. Within five days after the filing of such statement the clerk of the Court shall issue a summons against the owner to show cause before the next regular term of the county court, which does not commence within five days after service of such summons, why such property or corporate franchise, if any, shall not be assessed at the value named in the statement filed. The summons shall be executed by the sheriff of the county by delivering a copy thereof to the owner, if in the county, if not, then to his agent, attorney or person in possession of the property. At the next regular term of the county court after the notice has been served five days, if it shall ap-

pear to the court that the property is liable for taxation and has not been assessed, the Court shall enter an order fixing the value thereof at its fair cash value, estimated as is required by law; if not liable, he shall make an order to that effect. From so much of the order of the Court deciding whether or not the property is liable to assessment either party may appeal, as in other civil cases, except that no appeal bond shall be required where the Court decides that the property is not liable to assessment or taxation. It the Court shall decide that the propery is liable to assessment, the clerk of the county court shall certify to the Auditor of Public Accounts and the Sheriff a description of the property and the amount of the assessment for taxation, together with the amount of penalty and cost of assessment. All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum on the amount of the taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof. The taxes and penalties shall be collected and accounted for as other taxes and penalties are required to be collected. As compensation for his services in causing such property to be assessed, the officer filing his statement shall be entitled to the penalty, which shall be paid to him after the full amount of taxes shall have been collected. The county clerk shall enter all such assessments in a book to be kept for that purpose, showing the date of the assessment, the name of the person against whom the assessment is made, the location and quantity of the property assessed, the value fixed thereon; and the officer collecting the tax shall, when the same is paid, notify the clerk of its payment, which payment shall be noted by the clerk opposite the entry of such assessment."

United States Compiled Statutes (1901), Sections 4131, 4141, 4178, 4311 and 4334.

"§ 4131. Vessels registered pursuant to law and no others, except such as shall be duly qualified according to law for carrying on the coasting and fishing trade, shall be deemed vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels; but no such vessel shall enjoy such benefits and privileges longer than it shall continue to be wholly owned by a citizen or citizens of the United States, or a corporation created under the laws of any of the States thereof, and be commanded by a citizen of the United States. And all the officers of vessels of the United States who shall have charge of a watch, including pilots, shall in all cases be citizens of the United States. The word "officers" shall include the chief engineer and each assistant engineer in charge of a watch on vessels propelled wholly or in part by steam; and after the first day of January, eighteen hundred and ninety-seven, no person shall be qualified to hold a license as a commander or watch officer of a merchant vessel of the United States who it not a native born citizen, or whose naturalization as a citizen shall not have been fully completed."

"§ 4141. Every vessel, except as hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of such vessel, usually resides."

"§ 4178. The name of every documented vessel of the United States shall be marked upon each bow and upon the stern, and the home port shall also be marked upon the stern. These names shall be painted or gilded, or con-

sist of cut or carved or cast roman letters, in light color on a dark ground, or in a dark color on a light ground, secured in place, and to be distinctly visible. The smallest letters used shall not be less in size than four inches. If any such vessel shall be found without these names being so marked the owner or owners shall be liable to a penalty of ten dollars for each name omitted: *Provided, however*, That the names on each bow may be marked within the year eighteen hundred and ninety-seven."

"§ 4334. Every licensed vessel shall have her name, and the port to which she belongs, painted on her stern, in the manner prescribed for registered vessels; and if any licensed vessel be found without such painting, the owner thereof shall be liable to a penalty of twenty dollars."

Act of June 26, 1884, (U. S. Comp. Stat., 1901, p. 2831), reads:

Act of June 26, 1884 (U. S. Comp. Stat., 1901, p. 2831), reads:

"That the word 'port' as used in sections 4178 and 4334 of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of such vessel, shall be construed to mean either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built or where one or more of the owners reside."

"§ 4311. Vessels of twenty tons and upward, enrolled in pursuance of this title, and having a license in force, or vessels of less than twenty tons, which, although not enrolled, have a license in force, as required by this title, and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries."

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, A. D. 1905

No. 268

AYER & LORD TIE COMPANY
Plaintiff in Error

vs

THE COMMONWEALTH OF KENTUCKY, BY FRANK A. LUCAS, REVENUE AGENT OF SAID COMMONWEALTH,
Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

BRIEF FOR DEFENDANT IN ERROR

This action was originally instituted in the County Court of McCracken County, Kentucky, under Section 4241, Ky. Stats., by the Commonwealth of Kentucky, for the purpose of assessing for state, county and municipal taxation certain steamboats and barges belonging to the Ayer & Lord Tie Company.

The petition alleges that on the 15th day of September, in each of the years, 1899, 1900 and 1901, "said boats were en-

rolled, in accordance with the laws of the United States governing navigation, at the port of Paducah, in the County of McCracken and State of Kentucky; that, as required by the said laws of the United States governing navigation, the words "of Paducah, Ky.," were painted on the sterns of said steamboats; that said boats, when not in use, are kept at Paducah, Ky., and that the said port of Paducah is, and was, on each of said days, the home port of said steamboats;" that the barges were used in connection with the steamboats for the purpose of transporting railroad ties; that the said tie company was, on each of said days, the owner, seized of and in possession of said boats and barges; that said company had an office, on each of said days, in the City of Paducah, and that said steamboats and barges had not been assessed, nor taxes collected on them, for either of said years, by the State of Kentucky, County of McCracken or City of Paducah.

The answer admits the allegations of the petition, but sets up that the appellee is incorporated under the laws of Illinois, with its chief office at Chicago, Illinois; that it has several offices, located in different states, including one at Paducah; that the boats and barges in question are engaged in interstate commerce, and that their assessment and taxation under the authority of the State of Kentucky would be an interference with interstate commerce; that they occasionally touch at Paducah, but never to discharge cargo, but simply for the purpose of employing seamen, buying stores, etc.; denies that the home port of such boats is at Paducah, Kentucky, and denies the right of this state to assess or tax them. The answer, however, alleges that one, H. Baker, was the general manager of the transportation department of plaintiff in error,

the vessels in question herein; that said Baker was a
t of Paducah, and that **it was proper to enroll or register**
ssels at Paducah.

this answer a demurrer was entered by the State, which
erruled by the County and Circuit Courts of McCracken
. The State elected to stand by its demurrer and de-
to plead further, and judgment was rendered for the tie
ny. Upon appeal to the Kentucky Court of Appeals,
er, this judgment was reversed and the demurrer sus-
The case was then remanded to the McCracken Cir-
ourt, where upon hearing, the property was assessed.
efendant then appealed to the Kentucky Court of Ap-
where the judgment of the State Circuit Court was
d. From thence the action was brought, by writ of
to this Court.

ARGUMENT.

on the face of the petition, **a prima facie** case requiring
essment of these boats, as prayed for therein, is made
t least, the sufficiency of the petition was not challenged
ellee. The question then is, does the answer in this
resent facts which constitute a bar to their taxation?
ll discuss this question under two heads, viz:

Where are these vessels taxable?

Would the taxation of these vessels by the Kentucky
ities constitute an unwarranted interference with inter-
ommerce?

WHERE ARE THESE VESSELS TAXABLE?

e plaintiff in error, being a corporation created under
s of the State of Illinois, and having its chief office in

the City of Chicago, must be deemed as a matter of law, to have its domicile in that State and City.

The vessels are enrolled, in pursuance of the laws governing navigation, at Paducah, Kentucky, and, in compliance with those laws, have the words, "Of Paducah, Ky.," painted upon their sterns.

While, for purposes of taxation, the general rule is that "**mobilia sequuntur personam,**" such is by no means the invariable rule, and in many cases tangible personal property acquires a situs for taxation foreign to the residence of its owner. This was recently decided by this Court in the case of Union Refrigerator Transit Co. vs. Kentucky, decided in November, 1905. This was, like the case at bar, an appeal from the Kentucky Court of Appeals, and your honors, Mr. Justice Brown writing the opinion, there held that refrigerator cars, belonging to a Kentucky corporation, and in use upon the railroads in various parts of the United States, were not taxable at the home office of the company, in Kentucky, but wherever they might chance to be on assesment day. This same principle was also announced by this Court in the case of Brown vs. Houston, 114 U. S., 622 (29 L. Ed., 257) and Union Refrig. Transit Co. vs. Lynch, 177 U. S. 149 (44 L. Ed., 708) and more recently in the case of Delaware, Lackawana & Western Ry. Co. vs. Pennsylvania, decided by this Court on May 15, 1905.

By our law every vessel, above a certain tonnage, is required to have a home port. The reason for this is very clearly and succinctly stated in the following language of the Kentucky Court of Appeals in this case, viz:

"Vessels engaged in navigation upon the high

seas, and upon the Great Lakes and rivers of the United States are often separated by long distances from the residences of their owners. Such vessels, in so far as they are the property of citizens of the United States, are governed by its laws. It has been deemed wise by the general government, from the earliest period of its existence, that all vessels engaged in interstate or international commerce should have a home port, where they are registered and enrolled, enjoy certain privileges, and are subject to certain burdens and duties; and, that all who have business transactions with them may know beyond question their home port, it is required by statute that its name shall be painted in a certain way upon the stern of each vessel."

This "home port" has long been held to be the situs of vessels for purposes of taxation. Judson on Taxation, Sec. 186; Hays vs. Pacific Mail Steamship Co., 17 How., 596 (15 L. Ed., 254); Morgan vs. Parham, 16 Wall., 471 (21 L. Ed., 303); St. Louis vs. Wiggins Ferry Co., 11 Wall., 423 (20 L. Ed., 192); Battle vs. Mobile, 9 Ala., 234, 44 Am. Dec., 438; Irvin vs. N. O., C. & St. L. R. R. Co., 94 Ill., 105, 34 Am. Rep., 208; Johnson vs. De Bary-Baya Merchants Line, 37 Fla., 499, 37 L. R. A., 518; People vs. Pacific Mail S. S. Co., 58 N. Y., 242; Yost vs. Lake Erie Trans. Co., 112 Fed. Rep., 746; and Newport vs. Berry, 14 Ky. L. Rep., 29. Judson, in his work on Taxation, cited supra, says:

> "Steamboats and vessels navigating the public or navigable waters of the United States, are taxable as property, **irrespective of the residence of the owner,** in the home port of the vessels, which is said to be their situs for taxation."

It follows, therefore, that when we shall have determined

the **home port** of the vessels in question in this case, we shall have determined their **situs for taxation.**

The allegation in the answer of plaintiff in error, that the "home port" of these vessels is not Paducah, Kentucky, being the statement of a mere conclusion of law, cannot be considered as conclusive, even on demurrer, and it becomes necessary therefore, to determine from the facts themselves, where their home port is.

By an act of Congress, which became a law December 31, 1792, (Sec. 4141, Rev. St., U. S., U. S. Comp. Stat., 1901, page 2808) it is provided:

> "Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

Sec. 4178 (U. S. Comp. St., 1901, p. 2830) provides:

> "The name of every documented vessel of the United States shall be marked upon each bow and upon the stern, and the home port shall also be **marked upon the stern.**"

Sec. 4334 (U. S. Comp. Stats., 1901, p. 2968) provides:

> "Every licensed vessel shall have her name, **and the port to which she belongs,** painted on her stern, in the manner prescribed for registered vessels; and if any licensed vessel be found without such painting, the owner thereof shall be liable to a penalty of twenty dollars."

The decisions above quoted were rendered under the foregoing statutes. Under these statutes the home port was fixed

at the residence of the owner, if there were but one, or, if more than one, the residence of the vessel's husband, or acting and managing owner, was such home port. The name of this home port was to be painted on the stern, and there the vessel was liable to state taxation, except in those rare cases where it had, by its use, acquired a fixed and definite actual situs in some other locality.

But this rule, requiring the vessel to be registered or enrolled at the port of registry nearest to the residence of the owner, was somewhat relaxed by an act of Congress, which became a law on June 26, 1884, entitled "An act to Remove Certain Burdens on the American Merchant Marine, and to Encourage the American Foreign Carrying Trade, and for other purposes," by which it was provided:

> "That the word 'port' as used in Secs. 4178 and 4334 of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of such vessel, shall be construed to mean either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built or where one or more of the owners reside."

23 Stat. L., 58 (U. S. Comp. St., 1901, p. 2831.)

Under this last quoted act the owner, instead of being compelled to claim as the home port of his vessel the port of registry nearest to which he resided, was given the option of selecting any one of three places, viz: The port where the vessel was registered or enrolled, the place in the same district where the vessel was built, or where one or more of the owners reside. And, having made his choice, it became his duty, under the law, to indicate that choice by painting the

name of the port so selected on the stern of the boat.

With this law the Ayer & Lord Tie Co. has complied f
It registered its vessels at Paducah, Ky., and selected that
as the **home port** of its vessels and indicated the fact it
made such selection by painting the words "of Paducah, K
on the stern of each of said vessels. So that Paducah ther
became their home port and situs for taxation.

In addition to the fact that Paducah, Ky., was the h
port of these boats and their legal situs for taxation, we h
it as undisputed in this case that said boats, when not in u
are kept at Paducah; that they touch there for the purpose
buying stores, employing seamen, etc.; that the appellant
an office in that city; and that its manager in charge of s
boats resides in that city. When we consider these facts
connection with the fact that Paducah was chosen by app
lant as the home port of its boats, and so held out by it to t
world, the conclusion is, we submit, irresistible that Paduc
is not only the legal but the proper situs of these vessels f
taxation.

We do not think we can do better, in concluding th
part of our brief, than to quote from the language of th
decision of the Kentucky Court of Appeals in this case, givin
a few of the reasons why the vessels in question should b
taxed at Paducah rather than Chicago. That Court says:

> "The steamboats involved in this litigation ar
> separated from the residence of their owner by a long
> distance, in both geography and time; in fact, they
> can never visit the port at which their owner resides;
> they are, so far as their actual situs is concerned, per-
> manently confined to the rivers over which they float.
> If their home port had to be Chicago, because that is

the residence of their owner, as under the law prior to 1884, then they would have a home port from which they could derive no advantage or protection, because they could never reach it. It was to obviate this hardship, with others, that the act of 1884 was passed by Congress, permitting their owners to select for them a home port in the field of their operations, which is for them a home port in fact, as well as in law and name. Property, such as that under consideration, ought, logically, to be taxed at its home port; there it can be seen and properly valued for assessment by the fiscal officers; whereas, at the residence of its owner (Chicago), the officers, of necessity, must rely on the statements of the latter for both its existence and its value. At its home port it enjoys the protection of the laws of the jurisdiction in which it is located, and both justice and reason would seem to require that property thus permanently located, both in legal contemplation and in fact, within a jurisdiction foreign to that of its owner, should contribute its fair share to the support of that government whose protection it enjoys."

We come now to consider the reasons urged by the plaintiff in error, the Tie Company, why these vessels should not be assessed at Paducah. Truly, its counsel urge some strange reasons.

And first, as to the barges. It is said that because these barges are not enrolled or registered, have not the words "of Paducah, Ky.," painted on their sterns, and are not alleged to be kept in Paducah when not in use, they cannot be taxed there. But these barges are not required to be registered or enrolled at Paducah or anywhere else, or to have the name of that city, or any other city painted on their sterns, so that

their failure to do what the law does not require does not argu against the right of the State of Kentucky, or any other stat to tax them. It is simply a fact which has no bearing on th case at all.

What is alleged is that these barges are used, **in connectio with the steamboats in question,** for towing ties. The steam boats are tow-boats, and without barges to tow, would be o little value. The barges being used in connection with the boats, and being essential to the use of the latter, are taxable wherever the boats are taxable. All belonging to the same fleet, they are all taxable at the same place. The boats lie up at Paducah when not in use, and it is fair to presume, we think, in the absence of any showing to the contrary, and in view of the fact that the barges cannot navigate without the boats, and that the boats are of no account without the barges, that the barges are kept in the same place as the boats.

The case of Commonwealth vs. American Dredge Co., 122 Pa., 386, cited by counsel for plaintiff in error, is not at all in point, for the reason that the barges and dredges in that case were all unregistered, and there was no registered or enrolled vessel in the fleet. If there had have been, is it not reasonable to suppose that the home port of the vessel towing the barges and dredges would have been considered the **situs** for taxation of the barges and dredges, which were accompanying it, used in connection with it, and owned by the same company? We confidently expect that your honors will hold the barges to be taxable at the same place as the boats.

As to the steamboats the contention of counsel for the tie company seems to be that while the home port of a vessel, as indicated by her registry or enrollment, and by the name

carved on her stern, may be her situs for taxation, still if that registry or enrollment is made by an unauthorized person, it amounts to nothing and does not bind the company. This may or may not be true, but where in this case do we find anything to indicate that the boats were so registered or enrolled by an unauthorized person? It is asserted in the brief of counsel for the company that these boats were registered or enrolled at the port of Paducah by H. Baker, general manager of the transportation department of said company. But in making this assertion counsel are traveling somewhat outside the record. What the answer says is this:

> "Defendant, further answering, says that H. Baker, upon whom notice in this case was served, was, during the years 1899-1900, the general manager of the transportation department of the said Ayer & Lord Tie Co., of its said steamboats, Russell Lord, Pavonia, and in 1901 of steamer Inverness and its barges, and for convenience sake, and under the act of Congress, said steamers were enrolled or registered at the port of Paducah, Ky., and said Baker, being a resident of the State of Kentucky, and in which port it is proper to register or enroll said boats."

This answer does not allege that the vessels were registered by H. Baker, and does not say by whom they were registered, but it does say they were registered under the act of Congress and at the proper port. For aught that the record discloses H. Baker may or may not have registered the boats, and he may or may not be secretary or president of the Company. Even if all that plaintiff in error says in its brief were true, still this statute is merely directory, and it is not to be presumed that every person who deals with a vessel on the faith of its register or enrollment shall have the duty imposed

upon him of finding out who registered or enrolled the vessel. Nor is the State, in alleging the enrollment or registry of these vessels, compelled to allege by whom they were so registered, in order to make its allegation good, any more than it would, in alleging the incorporation of a company, be compelled to allege each step in the said incorporation. At any rate, H. Baker was the agent of the tie company, and it is bound by his acts within the apparent scope of his authority. Under this enrollment or registry, the plaintiff in error permitted the words "of Paducah, Ky.,," to remain on the sterns of their vessels for years, and if this enrollment is not good, they were without any legal enrollment.

It is most strenuously urged in the brief of counsel for plaintiff in error that the vessels could only be enrolled at Chicago; and that the enrollment or registry of these vessels at Paducah was contrary to law and unauthorized and void. However, in their answer, which they had the campany make, and in the part quoted above, they say the boats are registered and enrolled at Paducah, "**in which port it is proper to register or enroll said boats.**" We suppose that beyond doubt the answer governs in this matter, and merely call attention to it in order to show the inconsistency of their contention, and the need they now feel of shifting their ground. As to the right of the company to register or enroll its vessels at Paducah and to claim that port as their home port, enough is said in other portions of this brief to clearly demonstrate that it had that right.

Counsel for plaintiff in error fall into another serious mistake in assuming that the home port of a vessel is always the place of residence of the owner, or rather the port of registry

nearest the residence of the owner, and say that the law does not require the home port of the vessel to be painted upon its stern. To demonstrate the falsity of this position, however, only requires that the statutes shall be examined. Sec. 4178, Rev. Stats., as amended by the acts of 1891 and 1897 (as quoted **supra**) requires that "**the home port shall also be marked upon the stern.**" The section then proceeds to describe the kind of letters that shall be used in so marking the boat. Sec. 4334, Rev. Stats. (alsa quoted **supra**) uses the words "Every licensed vessel shall have her name, **and the port to which she belongs,** painted on her stern." This word "port," as used in these two sections, was defined by the act of June 26, 1884, quoted above, (Comp. Stats., 1901, p. 2831), to mean either the **port where the vessel is registered or enrolled,** or the place in the same district where the vessel was built or where one or more of the owners reside. By this act the owner is given the right to choose either of these three places as the vessel's home port, and the selection, when made, is to be indicated by painting the name of such home port, so selected, on the stern of the vessel, and when this is done it ends the matter and the home port is fixed.

It is contended, however, on behalf of plaintiff in error, even in the face of these plain statutory provisions, that the name of this port, to be painted on the stern, is not the name of the home port. But if not, what is it? It is not the place of registry, or enrollment, because that is only one of three places that may be so painted. It is not the place of residence of the owner, for the same reason. Is this name required to be painted merely for ornamentation, or to serve some useful purpose? And if it is not to indicate the selection, within the

law, made by the owner of a home port, what is its purpose?

This same contention was urged upon the Kentucky Court of Appeals by plaintiff in error, in a petition for a rehearing. That Court overruled the petition for a rehearing, and after calling attention to the wording of these statutes, quoted above, says:

> "The argument of counsel for appelle that the act of 1884, while changing the meaning of the word 'port' in Sections 4178 and 4334, left it unchanged as used in Section 4141, amounts to this: That the Congress of the United States, after a policy continued throughout a century, requiring the name of the home port to be painted on the stern of the vessels, suddenly changed that policy without any apparent reason, and permittted the name of a port which was not the home port to be painted thereon. We think that Congress required the name of the home port to be painted on the stern of the vessel for a wise and useful purpose, enabling all persons who had dealings with them to know where they belonged, and we are not willing to lightly adopt a construction that it was intended by the act of 1884 to leave the place where the owner resides as the home port of the vessel, and yet permit the name of another port to be painted upon the stern. This construction would not only fail to enable persons dealing with vessels to know of certainty their home port, but it would absolutely mislead by permitting false information to be hung out under governmental sanction."

(See 79 S. W., 290.)

Prior to the passage of the act of June 26, 1884, the port of registry of vessels and the residence of the owner must necessarily be the same, or near each other, because the owner had no option but to register or enroll his vessels at the port of

istry "at or nearest to which" the owner usually resided. case of Morgan vs. Parham, 16 Wall., 471, cited by counsel the tie company, arose under these old statutes, and New k, which was both the place of registry and the residence he owner of the vessels in question, was held to be their s for taxation. In St. Louis vs. Wiggins Ferry Co., 11 l., 423, we have another case which arose under these old utes. The owners lived in East St. Louis, Ill., which was a port of registry, and the nearest port of registry was St. is. The owners in that case had no option as to what ld be painted on the stern, and what was painted did not eate, under the statutes as they then existed, the **home** , but merely the port of registry. The same may be said he case of Mayer, et al. vs. Baldwin, 57 Ala., which counsel plaintiff in error also cite.

In the case of Yost vs. Lake Erie Trans. Co., 112 Fed. , 746, the vessels were held to be taxable at their **home , as indicated by the name of such home port painted upon r sterns.** In this case the owners chose as such home port roe, Mich., the place of incorporation of the company, er than Detroit, the place of registry. In the case at bar owner has chosen as such **home port** the port of registry nrollment, rather than its place of incorporation. It had ight to choose either, and the one chosen becomes thereby home port of the vessels, and their place of taxation.

As to the cases cited by counsel for plaintiff in error, to that, as regards liens for supplies furnished vessels, the dence of the owners is to be considered the home port, er than the port of registry, we think it sufficient to say all these cases arose prior to the act of June 26, 1884,

quoted above, except the one case of the Marion G. Harris, 81 Fed. Rep., 964, and in this case there was no registry at all, except a fraudulent one.

The state rests its case upon the propositions that vessels are taxable at their **home port**; that the **home port** is, either the place of registry or enrollment, the residence of one or more of the owners or the place where the vessel was built; that the owner may select either of these three as the vessel's **home port**, and indicate his selection by painting the name of such port on the stern of the vessel; that in the case at bar the owners have so selected and so indicated the port of enrollment, which is Paducah, Ky.; that the vessels, when not in use, are kept at Paducah; that the company has an office there; that the manager of these vessels lives there; and that there is where the vessels come to purchase supplies and employ seamen.

WOULD THE TAXATION OF THESE VESSELS BY THE KENTUCKY AUTHORITIES CONSTITUTE AN UNWARRANTED INTERFERENCE WITH INTERSTATE COMMERCE?

The facts of this case need but to be understood to negative this proposition, and consequently, as these facts are detailed elsewhere herein, we shall content ourselves with stating the law, and citing a few of the many authorities bearing upon the proposition. Plaintiff in error, in its brief, says nothing upon this point, but it is raised by its answer, and we feel that it should receive some notice at our hands.

If we have succeeded in demonstrating that the home port of these vessels is Paducah, and that that city is their **situs** for taxation, then they are taxable there, if any vessels at all are

subject to state taxation, and this we do not think will be denied. In Moran vs. New Orleans, 112 U. S., 69 (28 L. Ed., 655), his Court lays down the principle that vessels "may be taxed by state authority as property, provided, the tax be not a tonnage tax, is levied only at the port of registry and is valued as other property in the state."

These vessels are, it is true, engaged in interstate commerce—are instruments by means of which such commerce is carried on. But still they are only property within the State of Kentucky. No state can lay any tonnage tax, or lay any tax on interstate commerce itself, but the principle has always been recognized that the instruments by which interstate commerce was carried on were subject to state taxation as property wherever they might be situated, provided only that they were not discriminated against because of their occupation. Lou. & Jeff. Ferry Co. vs. Com., 22 Ky. L. Rep., 446; C. C. C. & St. L. Ry. Co. vs. Backus, 154 U. S., 439 (38 L. Ed., 1041); Henderson Bridge Co. vs. Com., 17 Ky. L. Rep., 389; Henderson Bridge Co. vs. Kentucky, 166 U. S., 150 (41 L. Ed., 953); Morgan vs. Parham, 16 Wall., 471 (21 L. Ed., 303). We really feel that it is useless, and an imposition upon the valuable time of this Honorable Court, as well as a reflection upon its knowledge of the law, to multiply authorities upon a proposition as elementary as this. Almost every one of the thousands of vessels that ply the noble oceans, lakes and rivers that surround and flow through our country, are more or less engaged in interstate commerce, but this does not relieve them from paying state taxes. These boats in the case at bar occupy similar positions, and must bear the same burdens.

We think that the motion by the tie company to remove

this case to the Federal Court was correctly overruled by the State Courts, for the reason that the Commonwealth of Kentucky is not a citizen within the meaning of the statute authorizing a removal of an action to the Federal Court upon the ground of diversity of citizenship. Upshur County vs. Rich, 135 U. S., 467 (34 L. Ed., 196); In re City of Chicago, 64 Fed. Rep., 897; Arkansas vs. K. & T. Coal Co., 183 U. S., 185 (46 L. Ed., 144); Pennington vs. Woolfolk, 3 Ky. L. Rep., 42; Baldwin vs. Shine, 8 Ky. L. Rep., 496; C., St. L. & N. O. R. R. Co. vs. Commonwealth, (Ky.) 72 S. W., 1119.

Respectfully submitted,

TAYLOR & LUCAS,

Attorneys for Defendant in Error.

Paducah, Ky., March, 1906.

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Supreme Court of the United States.

No. 268.—October Term, 1905.

Ayer and Lord Tie Company, Plaintiff in Error, *vs.* The Commonwealth of Kentucky, by Frank A. Lucas, Revenue Agent of said Commonwealth.	In error to the Court of Appeals for the State of Kentucky.

[May 21, 1906.]

The Commonwealth of Kentucky, by Frank A. Lucas, revenue agent, commenced an action in the County Court of McCracken County to recover from the Ayer and Lord Tie Company alleged omitted State, county and municipal taxes for the years 1899, 1900 and 1901, claimed to be assessable upon two steamboats and certain barges, and for the year 1901 upon one other steamboat, all the property of the company.

In the statement of the plaintiff the right to recover in respect of the steamboats was based solely upon the assertion that on the dates when it was alleged the boats became subject to the taxes in question they were "enrolled, in accordance with the laws of the United States governing navigation, at the port of Paducah, in the county of McCracken and State of Kentucky; that, as required by the said laws of the United States governing navigation, the words of 'Paducah, Kentucky' were painted on the stern of said steamboats; that said boats, when not in use, are kept at Paducah, Kentucky, and that the said port of Paducah is, and was on each of said days, the home port of said steamboats."

The right to recover in respect of the barges was based upon the allegation that "each and all of said boats are now and were on each of the above days mentioned used by the defendant for the purpose of towing ties, loaded on barges; that the defendant was, on each of the days aforesaid, the owner, seized of and in possession of certain barges, used in connection with said steamboats, for the purpose of transporting railroad ties."

The tie company answered as follows: That it was an Illinois corporation, chartered in 1893, and empowered "to transact business with steamboats engaged in interstate commerce;" that "ever since its corporation it has been engaged in business as owner of towboats, plying on the Mississippi, Ohio, Tennessee and Cumberland Rivers, and their tributaries; that the business in which towboats had been engaged is that

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of interstate commerce and of transporting railroad ties in its own barges from different points of said rivers to the port of Brookport, in the State of Illinois; that their said towboats, in pursuit of their business, occasionally touch at the point of Paducah, Kentucky, but never to discharge their cargo, but simply for the purpose of buying stores, employing seamen, and for other like purposes; that they and said barges are in the State of Kentucky but temporarily, and most of their business is transportations from ports and places in Alabama, Mississippi, Kentucky, Missouri, Arkansas, Illinois and Tennessee to said port of Brookport, in the State of Illinois; St. Louis, in the State of Missouri; Duvals Bluff, in the State of Arkansas, at which ports said towboats discharge and deliver their respective cargo of ties, and said boats and barges, owned and controlled by Ayer and Lord Tie Company was engaged in the business aforesaid during and prior to years 1899, 1900 and 1901, and since owned by the said defendant company, have never been engaged in any other business but as aforesaid, nor has said company since its incorporation been engaged in any other business than as aforesaid; that their said vessels were and are regularly licensed and enrolled by the United States under and in pursuance to the acts of Congress."

It was further averred that although the tie company had offices in various cities of Illinois situated on the Ohio River, as also offices in the cities of Paducah and Fulton in the State of Kentucky, and Duvals Bluff in the State of Arkansas, it had such offices in Kentucky for convenience, and its principal office was averred to be in the State of Illinois, of which State it was a citizen.

It was denied that the home port of its vessels was in the port of Paducah, Kentucky, and it was averred that such vessels were enrolled in Kentucky for convenience, and that when they were so enrolled the general manager of its transportation department and of the steamboats of the tie company was a resident of the State of Kentucky.

It was further specifically averred that during the year for which the State of Kentucky was seeking to assess the property in question for taxation "all of said property was assessed (listed?) by the defendant in the State of Illinois for taxation, and has been taxed, and defendant has paid taxes under the State of Illinois, to said State and city of Chicago on all of said property, and denies the right of the State of Kentucky to subject same property to taxation."

Claiming the right under the commerce clause of the Constitution of the United States to trade at the ports of the different States without molestation by the State of Kentucky, the company averred that the imposition and the collection of taxes in question would operate an unlawful interference with the right of the company to trade or engage in interstate commerce as it had heretofore been accustomed to do.

A demurrer was filed to the answer on the ground that it did not state facts sufficient to constitute a defense. The county court overruled the demurrer, and plaintiff declining to plead further, the court dismissed "the plaintiff's statement and action." The case was then taken by appeal to the Circuit Court of McCracken County. As part of the record from the county court the defendant filed in the Circuit Court a petition and bond for removal of the cause to a Federal court, upon the ground of diversity of citizenship. On the trial of the case, before action taken on a demurrer which had been refiled to the answer, the court overruled and dismissed the petition for removal, and the defendant excepted. The demurrer to the answer was overruled, and, the plaintiff declining to plead further, a judgment of dismissal was entered. The cause was then appealed to the Court of Appeals of Kentucky. That court held that the demurrer should have been sustained, and the judgment in favor of the company was reversed. (77 S. W. 686.) A petition for rehearing was denied for reasons stated in an opinion. (79 S. W. 290.)

After the mandate of the Court of Appeals was filed in the Circuit Court that court, upon the pleadings and the mandate and opinion of the Court of Appeals, entered a judgment sustaining the demurrer, and, the defendant declining to plead further, the allegations of plaintiff's statement were taken for confessed, and it was adjudged that the property therein described was liable for taxation at the values stated in the judgment, and the defendant was adjudged to pay the taxes due upon such assessable values for the years in controversy, with the statutory penalty. In compliance with the request of the defendant the court separately stated its findings of fact and conclusions of law, which are as follows:

"Separation of Findings of Facts from Conclusions of Law.

"That the defendant was, at the time specified in the pleadings, the sole owner of the following-described property, named in the petition, to wit: Steamers Russel Lord, Pavonia, Inverness and barges; that the same were of the value as follows, as set out in the statement: Russel Lord, $13,000; Pavonia, $10,000; Inverness, $2,500; barges, $10,000; that the defendant had enrolled said steamboats at Paducah, Kentucky, with the name Paducah painted on the stern of said vessels; that the defendant was a corporation legally incorporated under the laws of the State of Illinois.

"As a matter of law the court adjudges that the port of Paducah, Kentucky, was, at the times mentioned in the statement, the home port of said vessels and barges belonging to defendant and named in the statement, and that all of said vessels were liable to assessment and valuation, at the times stated in the statement, in McCracken County, Kentucky, for purposes of State, county and city taxes for the years, respectively, Russel Lord and Pavonia, 1899, 1900 and 1901; Inverness, 1901; barges, 1899, 1900 and 1901. The defendant excepts to each of the above findings of facts, and also to all of the conclusions of law."

A motion to set aside the judgment and for a new trial having been made and overruled, the cause was again appealed to the Court of Appeals of Kentucky. That court affirmed the judgment of the Circuit Court upon the authority of its previous opinion, and the case was then brought to this court.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

As in the argument counsel for plaintiff in error has not discussed the alleged error in overruling the motion to remove, we treat that question as waived and pass to the merits.

Notwithstanding, by the demurrer to the answer, it was conceded that the tie company was the owner of the alleged taxable property, that it was an Illinois corporation and that its main office was in Chicago, that it had paid taxes in Illinois upon such property, that the property was employed in interstate commerce between ports of different States, including the State of Illinois, that its steamboats were enrolled at Paducah, Kentucky, for convenience, Kentucky being the place of residence of one of its managing officers, and that its boats touched at Paducah only temporarily, never receiving or discharging cargo at that port, the Court of Appeals of Kentucky held that the property in question was subject to the taxing power of the State of Kentucky. The existence of power in the State to tax the property in question was rested solely upon the proposition that as the steamboats were enrolled at Paducah, and the name Paducah was painted upon their sterns, it was to be conclusively presumed that the home port of the vessels was at Paducah, and that such home port was the situs of the property for taxation. The barges were brought within the principle announced, because they were treated as mere accessories of the steamboats. While in the opinion the steamboats were regarded as operated under a registry, the fact is they were engaged in the coastwise trade under an enrollment and license. But this is immaterial, since vessels in order to be enrolled must possess the qualifications and fulfill the requirements necessary for registration.

To comprehend the question a chronological statement of the legislation of Congress as to the registration or enrollment of vessels, etc., is necessary.

By section 3 of an act approved December 31, 1792, (1 Stat. 288,) it was provided as follows:

"SEC. 3. *And be it further enacted*, That every ship or vessel, hereafter to be registered, (except as hereinafter provided,) shall be registered by the collector of the district in which shall be comprehended the port to which such ship or vessel shall belong, at the time of her registry, which port shall be deemed to be that, at or nearest to which, the owner, if there be but one, or if more than one, the husband or acting managing owner of

such ship or vessel, usually resides. And the name of the said ship or vessel, and of the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters of not less than three inches in length. And if any ship or vessel of the United States shall be found without having her name, and the name of the port to which she belongs, painted in the manner aforesaid, the owner or owners shall forfeit fifty dollars; one-half to the person giving the information thereof; the other half to the use of the United States."

On June 23, 1874, (18 Stat. 253,) the foregoing provision was amended so as to allow the name of the vessel to be painted upon her stern in yellow or gold letters. In the Revised Statutes the requirement in question was separated into two sections, (sections 4141, 4178,) reading as follows:

"SEC. 4141. Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

"SEC. 4178. The name of every registered vessel, and of the port to which she shall belong, shall be painted on her stern, on a black ground, in white letters of not less than three inches in length. If any vessel of the United States shall be found without having her name and the name of the port to which she belongs so painted, the owner or owners shall be liable to a penalty of fifty dollars, recoverable one-half to the person giving the information thereof, the other half to the use of the United States."

By section 2 of the act of February 18, 1793, (1 Stat. 305,) "for enrolling and licensing ships or vessels to be employed in the coasting trade," etc., the same requirements were made essential for enrollment as for registering, and by section 11 licensed vessels were specifically obliged to have the name and port painted on the stern. As incorporated into the Revised Statutes the latter provision reads as follows:

"SEC. 4334. Every licensed vessel shall have her name and the port to which she belongs painted on her stern, in the manner prescribed for registered vessels; and if any licensed vessel be found without such painting the owner thereof shall be liable to a penalty of twenty dollars."

By section 21 of an act approved June 26, 1884, (23 Stat. 58,) it was provided as follows:

"SEC. 21. That the word 'port,' as used in sections forty-one hundred and seventy-eight and forty-three hundred and thirty-four of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of such vessel, shall be construed to mean either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built or where one or more of the owners reside."

Again, by acts approved February 21, 1891, c. 250, sec. 1, (26 Stat. 765,) and January 20, 1897, c. 67, sec. 1, (29 Stat. 491,) section 4178, Rev. Stat. was amended so that it now reads as follows:

"SEC. 4178. The name of every documented vessel of the United States shall be marked upon each bow and upon the stern, and the home port shall also be marked upon the stern. These names shall be painted or gilded, or consist of cut or carved or cast roman letters in light color on a dark ground, or in a dark color on a light ground, secured in place, and to be distinctly visible. The smallest letters used shall not be less in size than four inches. If any such vessel shall be found without these names being so marked the owner or owners shall be liable to a penalty of ten dollars for each name omitted: *Provided, however,* That the names on each bow may be marked within the year eighteen hundred and ninety-seven."

Was the ruling below justified by these statutes? We think not.

The general rule has long been settled as to vessels plying between the ports of different States, engaged in the coastwise trade, that the domicil of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrollment, subject, however, to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a State other than the place of the domicil of the owner, it may there be taxed because within the jurisdiction of the taxing authority.

In *Hays* v. *Pacific Mail S. S. Co.* (17 How. 596,) vessels were registered in New York, where the owner resided. The vessels were employed in commerce on the Pacific Ocean between San Francisco and Panama, and the question was whether the vessels were subject to taxation in California. It was decided that they were not, as they had not become incorporated into the property of California so as to have an actual situs in that State, and it was declared that the vessels were properly taxable at the domicil of their owner.

In *St. Louis* v. *Ferry Co.*, (11 Wall. 423,) the boats of the company, an Illinois corporation, were enrolled at St. Louis and plied between that city and the city of East St. Louis, in the State of Illinois. The company had an office in St. Louis, where its president and other principal officers lived and where the ordinary business meetings of the directors were held and the corporate seal was kept. A tax was paid upon the boats in Illinois, the residence of the owner. The city of St. Louis taxed the ferry boats as personal property "within the city." It was, however, held that the boats did not so abide within the city as to become incorporated with and form part of its personal property, citing *Hays* v. *Pacific S. S. Co.*, (17 How. 559.) In the course of the opinion the court said (italics mine):

"The boats were enrolled at the city of St. Louis, but that throws no light upon the subject of our inquiry. The act of 1789, sec. 2, 1 Stat. at L. 55, and the act of 1792, sec. 3, 1 Stat. at L. 287, require every vessel to be registered in the district to which she belongs, and the fourth section of the former act and the third section of the latter, declares that her home port shall be that at or near which her owner resides. *The solution of the question where her home port is, when it arises, depends wholly upon the*

locality of her owner's residence, and not upon the place of her enrollment. (3 Kent, Com. 133, 170; *Hill* v. *The Golden Gate*, Newb. 308; *The Superior*, Newb. 181; *Jordan* v. *Young*, 37 Me. 27, 29.)"

In *Morgan* v. *Parham*, (16 Wall. 471,) a vessel originally registered in New York had been engaged for years in the coastwise trade between Mobile and New Orleans and was enrolled at Mobile. It was decided that the boat could not be taxed in Alabama.

In *Transportation Co.* v. *Wheeling*, (99 U. S. 273,) vessels enguged in commerce between ports of different States were held taxable at the domicil of the owner.

Quite recently, in *Old Dominion S. S. Co.* v. *Virginia*, (198 U. S. 299,) the foregoing authorities were approvingly cited, and were in effect reaffirmed. In that case the vessels were enrolled in New York, the domicil of the owner, but, although engaged in interstate commerce, the vessels were navigated wholly within the limits of the State of Virginia, it was held that they came within the exception to the general rule which we have previously stated, and were properly taxable in Virginia.

As in the case at bar, the owner of the vessels was domiciled in Illinois and the vessels were not employed exclusively in commerce between points in the State of Kentucky, but were engaged in traffic between that State and the ports of other States, including Illinois, it seems obvious that, as a question of fact they had no permanent situs in the State of Kentucky within the rule announced in the Old Dominion Steamship case. The right then of the State of Kentucky to tax the vessels must solely depend upon the fact that they were enrolled at the port of Paducah in that State. But, if enrollment at that place was within the statutes, it is wholly immaterial, since the previous decisions to which we have referred decisively establish that enrollment is irrelevant to the question of taxation, because the power of taxation of vessels depends either upon the actual domicil of the owner or the permanent situs of the property within the taxing jurisdiction. The court below, however, did not apparently decline to apply the previous decisions of this court, but treated them as inapposite, under the assumption that they were rendered before the act of 1884, and that the necessary effect of that statute was to change the general law so as to cause vessels to be subject to taxation within a State where they were enrolled, although that State was neither the residence of the owner nor the place of the actual situs of the property. As the ruling below was made before the decision of this court in the Old Dominion Steamship Company case, rendered since the act of 1884, we might well leave the demonstration of the error into which the court fell to result from the decision of that case, since the ruling below is wholly inconsistent with that decision. This clearly follows, since in the Old Dominion Steamship case the right of the State of Virginia to tax was based upon the permanent situs of the vessels

in Virginia, although they were enrolled in another State. But in view of the general importance of the subject we shall briefly point out the mistaken construction given by the court below to the act of 1884.

After referring to the act of 1884, and quoting the provisions of the Rev. Stat. sec. 4178, as now existing, the court below said:

"Appellee had a right to cause its boats to be registered at Paducah, although that was not the place nearest to the port where it resided, and it fully complied with the law regulating the subject by painting the words 'of Paducah, Ky.,' on the sterns thereof; and by the amendment of 1884, Paducah became the home port of the vessels so registered and marked."

* * * * * *

"The steamboats involved in this litigation are separated from the residence of their owner by a long distance; in fact, they can never visit the port at which their owner resides; they are, so far as their actual situs is concerned, permanently confined to the rivers over which they float; if their home port had to be Chicago, because that is the residence of their owner, as under the law prior to 1884, then they would have a home port from which they could derive no advantage or protection, because they could never reach it. It was to obviate this hardship, with others, that the act of 1884 was passed by Congress, permitting their owners to select for them a home port in the field of their operations, which is for them a home port in fact, as well as in law and in name. Property, such as that under consideration, ought, logically, to be taxed at its own home port; there it can be seen and properly valued for assessment by the fiscal officers; whereas, at the residence of its owner (Chicago), the officers, of necessity, must rely on the statements of the owner for both the existence of the property and its value. At its home port it enjoys the protection of the laws of the jurisdiction in which it is located, and both justice and reason would seem to require that property thus permanently located, both in legal contemplation and in fact, within a jurisdiction foreign to that of its owner, should contribute its fair share to the support of that government whose protection it enjoys."

It is at once apparent that this line of reasoning, whilst it asserts the principle of actual situs and expounds the act of 1884 as making that the exclusive rule to test the power to tax, at once causes the act to destroy the very principle which it was assumed the act upheld. This is the inevitable consequence of the conclusion reached by the court below, that the act of 1884 endowed the owner of a vessel with the power, simply by the painting a name of a place upon his vessel, to make such place the situs for taxation, although it might be neither the actual situs of the property nor the residence of the owner.

The act in question was an elaborate one, containing thirty sections, relating to the American merchant marine, and was entitled "An act to remove certain burdens from the American merchant marine and encourage the American foreign carrying trade, and for other purposes." (23 Stat. 53.) The only provision contained in that act which had any reference to the subject under consideration and which was relied upon in the court

below was section 21, which we have previously quoted, and which we again copy:

"SEC. 21. That the word 'port,' as used in sections forty-one hundred and seventy-eight and forty-three hundred and thirty-four of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of such vessel, shall be construed to mean either the port where the vessel is registered or enrolled or the place in the same district where the vessel was built or where one or more of the owners reside."

Clearly this section does not essentially change the prior general law law respecting enrollment, as it simply enlarges the power of an owner in regard to painting on the stern of his vessel the name of the place from which he may desires to hail her. The prior provisions as to enrollment clearly exacted that the owner, as an incident to enrollment, should mark upon his vessel the name of the place of enrollment; in other words, compelled the owner to hail his vessel from the place of enrollment, although he might be domiciled elsewhere. Now, as the settled rule at the time of the passage of this act was that enrollment, and consequent marking of the stern of the vessel with the name of the place of enrollment, was not the criterion by which to determine the power of taxation, it is impossible to conceive that Congress intended, by merely conferring a privilege to select the name of a place other than the port of enrollment to be marked upon a vessel, to overthrow the settled rules in regard to taxation of such property which existed at the time of the passage of the act of 1884. To give to the statute the construction adopted by the court below would be simply to hold that its purpose was to endow the owner with the faculty of arbitrarily selecting a place for the taxation of his vessel in defiance of the law of domicil and in disregard of the principle of actual situs, since by the statute the owner was given the right to paint either the name of the place where the vessel was built, where enrolled, or where one of the owners resided. And this demonstrates the misconception of the construction given to the act of 1884 by the court below, since the court declared that the whole effect of the act was to endow the owner of vessels with the power to select, by marking on the stern, a place "in the field of operations," which should be the place of taxation. But no such limitation as the field of operations can be implied from the language of the statute, and, therefore, if the construction adopted were upheld the unlimited right of the owner to arbitrarily frustrate the taxing laws of the State where he was rightfully subject to taxation would result.

Undoubtedly, as we have said, the general statutes as to enrollment in force prior to 1884 required that the name of the port to be painted upon the vessel should be the port of enrollment, although such place might not be the domicil of the owner. In practice, however, that rule was not always

observed, because the owners of vessels desired to hail them from the place of the residence of the owner. (*The Albany*, 4 Dill. 439.) And the history of the adoption of the provision now known as section 21 of the act of 1884 referred to leaves no room for doubt that Congress simply intended to legalize such practice. The provision had its origin in an amendment unanimously reported by the Committee on Commerce of the Senate on May 1, 1884, to a bill then pending in the Senate. The chairman of the committee, in reporting the proposed amendment, said (15 Cong. Rec. p. 3650):

"Mr. FRYE. The next amendment I am authorized to offer is a section in reference to the painting of the name of the ship on the stern. Not very important that must appear to Senators. Many of our shipowners in the State of Maine think more of that than they do of the rest of this bill. The man who owns a ship looks upon her as his wife or his children; he loves his ship; and under the law as it stands to-day he is required to paint on the stern the name, it may be that of his wife or of his daughter and the port to which she belongs. For seventy-five years the port to which she belonged was construed to be the place where she was owned, and if a man built a ship in Surry, and she was owned there, he painted on the stern the 'May Ann, from Surry, Me.' In 1875 a sharp Treasury official discovered that it was a violation of the law. He reported to the Secretary of the Treasury, and the Secretary issued an order that all those ships must bear the name of the port of entry, regardless of where they were built or owned. They are building vessels, home vessels, owned at home, owned in families, in many instances by the blacksmith, the carpenter, the captain, and the mate. Their vessels they wish to name after one of the family and the home, the place where she is owned and built, and yet under the construction of the Treasury Department she may be the 'Julia Ann,' from Machias, her port of entry, but actually built and owned a hundred miles from there. Take Bath and Richmond, on the Kennebec River—Bath, the greatest ship building city in the United States to-day of wooden ships; her rival, Richmond, is fifteen miles above. The men who build their ships in Richmond regard it as about as serious a wrong as can be imposed upon them by law to compel them to put a ship built there and owned there under the name of Bath, her port of entry, and Bath would fully reciprocate under like circumstances. I take it that no Senator will object to that provision.

"Mr. HALE. Just there let me ask my colleague, was not the reason for the ruling of the Secretary of the Treasury that the technical view was taken of the word 'port,' and it was concluded there could be nothing but the port of entry, thereby taking away this privilege from the men who built the ship?

"Mr. FRYE. I so understand it."

And, without debate, the amendment was adopted, and subsequently, with other amendments, was incorporated as part of the bill which came from the House of Representatives, relating to the same general subject as the bill which was under consideration in the Senate. (Ib. pp. 3869, 3973, 5440.)

The suggestion that because the vessels were enrolled at Paducah the owner was estopped from disputing that they had a situs for taxation there, is but to contend that the place of enrollment was *per se* controlling, in disregard of the repeated rulings of this court to the contrary.

The judgment of the Court of Appeals of Kentucky must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.